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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1969

No. 419

RICHARD S. SIMPSON,
Petitioner,
vs.
UNION OIL COMPANY OF CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

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Subject Index

	Page
Opinions below	1
Jurisdiction	2
Questions presented	3
Statutes involved	6
Statement of the case	7
A. The trial	7
1. The ousting of Richard Simpson	7
2. Damages suffered	10
3. The district court's ruling as to the mandate of this court	15
4. The trial on the equities	17
(1) 1950 to 1959—Union Oil was under charges of violating the Sherman Act, Sections 1 and 2, based in part, on a conspiracy with all the majors operating in the Pacific states area to control the pricing judgments of independent station dealers	17
(2) Late 1954—Defendant determined to utilize price fixing consignment as a means of dealer price control based on cursory analysis of anti-trust law by its own counsel	18
(3) The retail dealer consignment agreement did not follow the General Electric form of agreement and the dealers absorbed price declines	21
(4) The House of Representatives, Select Committee on Small Business, Subcommittee No. 5 investigations of distribution practices in the petroleum industry of 1955 and 1957, involving Union's consignment agreement program in 1957, and testimony therein	24
(5) The unmeritorious claim that the Department of Justice approved Union's consignment agreement program as lawful	28
(6) The trial court's rulings on the equities and motion for a new trial	28

Page

(7) Opinion of the appellate court 30

Reasons for granting the writ 32

I

Petitioner's complaint has been dismissed with prejudice based upon an erroneous interpretation of this court's mandate in Simpson v. Union Oil Company of Calif., 377 U.S. 13 (1964) 32

A. This court has never sanctioned the prospective application of its antitrust decisions to the parties who have litigated all the issues necessary for the recovery of damages 32

1. The dismissal of Simpson's complaint based on the "equities" was erroneous since the defendant was found in this court to have violated the Sherman Act and it was not disputed at the trial that plaintiff lost his business as a result of defendant's enforcement of its illegal price fixing program, unprotected by the McGuire Act 32

B. The equities urged by Union Oil Company were precluded by the decision of this court in Simpson 38

1. The decision of this court did not allow Union Oil to successfully argue that it relied upon General Electric and Simpson was completely predictable 38

2. The final judgment in United States v. Standard Oil Co. of Calif., et al., 1959, was urged by defendant to this court as decisive and was rejected in Simpson 40

3. There is no equity that Richard Simpson knew of Union Oil Company's consignment agreement program 42

C. Even assuming that Union Oil did rely upon General Electric the existing state of law in 1954 or 1958 prevents the courts from holding that the reliance was justifiable or in good faith 42

II

Page

The decision of the court below is in conflict with United States Constitution, Article III, the doctrine of separation of powers, and the supremacy of the jury on issues of fact, Amendment VII 45

A. This court has declared that the Constitution requires that parties who bring about an innovative principle of law are entitled to the benefits of the rule announced 45

1. In the area of criminal law, this court has declared that the Constitution prohibits denying to litigants who establish a new constitutional rule, the benefits of his litigation 45

2. The doctrine of separation of powers prevents prospective application of the Sherman Act to persons injured by a violation of the Sherman Act 46

3. The jury verdict necessarily precluded a judgment on the equities against Simpson 47

III

Even assuming that this court did intend to have its decision operate prospectively in Simpson, the defendant has acted coercively and can offer no equities in view of its decision to risk the validity of its consignment agreement program 48

A. Union Oil took a calculated risk as to the lawfulness of its retail price fixing by the consignment device in the face of protesting dealers and governmental investigation; its counsel was negligent in analyzing the existing state of law, and the record showed an unethical and unauthorized filing of affidavits of jurors in an attempt to show that the jury failed to follow the court's instructions 48

IV

The decision of the court below is in conflict with an established rule of damage law applicable to antitrust

Page

cases which allows the recovery of loss of profits for a reasonable period of time in the future following the destruction of a business enterprise by conduct in violation of the antitrust laws 50

A. Service station dealers subject to short term leases are entitled to the recovery of damages based on the value of their anticipated future profits when they have been dispossessed by owner-supplier's violation of the antitrust laws 50

V

The trial court abused its discretion in granting a new trial 53

Conclusion 54

Table of Authorities Cited

Cases	Pages
Atlantic Refining Co. v. Federal Trade Commission, 344 F. 2d 599 (6th Cir., 1965)	44
Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959)	47
Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1946)	50
Curtis Publishing Company v. Butts, 388 U.S. 130 (1967)	46
Desist v. United States, ... U.S. ....., 89 S. Ct. 1030 (1969)	45
Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927)	50
Ethyl Gasoline Corporation v. United States, 309 U.S. 436 (1940)	42, 43
Federal Trade Commission v. Atlantic Refining Co., 381 U.S. 357 (1965)	36
Federal Trade Comm'n v. Beech-Nut Packing Co., 257 U.S. 441 (1922)	20, 35
Federal Trade Comm'n v. Texaco, Inc., ... U.S. ....., 89 S. Ct. 429 (1968)	34, 36
Hanover Shoe, Inc. v. United Shoe Machinery Corp., 377 F. 2d 776 (3d Cir. 1967)	33, 44
Paul M. Harrod Co. v. A. B. Dick Co., 194 F. Supp. 502 (N.D. Ohio, 1961)	41
Lessig v. Tidewater Oil Co., 327 F. 2d 459, cert. den. 377 U.S. 993 (Jan. 2, 1964)	52
Liquid Veneer Corp. v. Smuckler, 90 F. 2d 196 (9th Cir. 1967)	54
McDonald v. Pless, 238 U.S. 264 (1915)	49
Northern Pac. Ry. Co. v. Mely, 219 F. 2d 199 (9th Cir. 1954)	49
Northern Pacific Ry. Co. v. United States, 356 U.S. 1 (1958)	35
Perkins v. Standard Oil Co. of Calif., ... U.S. ....., 1969 Trade Cases, ¶ 72,822	50, 54
Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968)	34

Pages

Radovich v. National Football League, et al., 352 U.S. 445 (1957) 37
Ramsey Co. v. Associated Bill Posters, 42 F.2d 152 51
Rankin v. Associated Bill Posters, 42 F. 2d 152 (2d Cir., 1930) 51

Simpson v. Union Oil Co., 311 F. 2d 764 (1963) 2
Simpson v. Union Oil Co., 377 U.S. 949 2
Simpson v. Union Oil Co. of Calif., 377 U.S. 13 (1964) ...passim
Simpson v. United States District Court, 385 U.S. 806 (1966) 2, 17
Standard Oil Company and Standard Stations, Inc. v. United States, 337 U.S. 293 (1949) 35, 36, 43
Stein v. New York, 346 U.S. 156 (1953) 49
Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931) 50, 54
Stovall v. Denno, 388 U.S. 293 (1967) 3, 45, 46

Twentieth Century Fox Film Corp. v. Brookside Theatre Corp., 194 F. 2d 846 (8th Cir., 1962) 51

Union Carbide & Carbon Corp. v. Nisley, 300 F. 2d 561 (10th Cir. 1962) 50
United States v. American Tobacco Co., 328 U.S. 781 (1946) 33
United States v. General Electric Company, 272 U.S. 476 (1926) 3, 16, 19, 21, 30, 31, 33, 38, 39, 48
United States v. General Motors Corp., 121 F. 2d 376 (7th Cir., 1941) 20, 35
United States v. Masonite Corp., 316 U.S. 265 (1942) 4, 20, 23, 39, 40
United States v. Parke Davis & Co., 362 U.S. 29 (1960) ... 35
United States v. Richfield Oil Co., 99 F. Supp. 280 (1951), aff'd, 343 U.S. 922 (1952) 4, 19, 20, 35, 37, 43
United States v. Socony Vacuum Oil Co., 310 U.S. 150 (1940) 43
United States v. Standard Oil Co. of California, et al., 1959 Trade Cases, ¶ 69,399 ..... 3, 16, 28, 39, 40
United States v. United States Gypsum Co., 333 U.S. 364 (1948) 47

Zenith Radio Corp. v. Hazeltine Research, Inc., ... U.S. ....., 1969 Trade Cases, ¶ 72,800 50

Constitutions

United States Constitution: Pages
Article III 45
Amendment VII 45

Statutes

Clayton Act:
Section 4 (15 U.S.C. 15) 6, 46
Sherman Act:
Section 1 (15 U.S.C. 1) 6
Section 2 (15 U.S.C. 2) 6

Texts

20 Am. Jur. 2d, Courts, Section 233, p. 562 (1965, Supp. 1967) 33
Federal Trade Commission Report on Anticompetitive Practices in the Marketing of Gasoline, June 30, 1967, p. 42 .. 36

Other Authorities

CCH Trade Reg. Rep. ¶ 10,373 36

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PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

Richard S. Simpson petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this cause on April 30, 1969, and its judgment of June 12, 1969 denying rehearing.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 1969 Trade Cases, ¶ 72,788

(Appendix A herein). The Court's opinion denying the hearing is not yet officially reported (Appendix B herein). This is the second appeal involved in this litigation.[1] The opinion of the District Court in originally granting the defendant summary judgment is reported at 1961 Trade Cases, ¶ 69,936, and appears at R. 347-360. The first opinion of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of the Trial Court, is reported at 311 F.2d 764 (1963) and appears at R. 564-573. The opinion of the Supreme Court of the United States, reversing, appears at 377 U.S. 13 (1964), rehearing denied, 377 U.S. 949. Following the mandate of this Court, before trial, petitioner in August, 1966, sought a Writ of Prohibition or, alternatively, a Writ of Mandamus to prohibit a trial on the equities which was denied in *Simpson v. United States District Court*, 385 U.S. 806 (1966).

JURISDICTION

The jury verdict was rendered February 17, 1967 (Cr. 297). The Judgment of the Court of Appeals was entered April 30, 1969 (Cr. Vol. 1). A petition for rehearing was denied on June 12, 1969 (Cr. Vol. 1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

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[1]References to the record, *Simpson v. Union Oil Co. of Calif.*, 377 U.S. 13 (1964) will be designated as "R." References to the Clerk's Record below filed pursuant to this petition will be designated as "Cr.", and references to the trial transcript will be designated as "Tr."

QUESTIONS PRESENTED

1. Does the failure of the Courts below to enter judgment upon the jury verdict in the amount of $160,000.00 in favor of petitioner Richard S. Simpson on the ground that defendant has shown equities which prevent the retroactive application of this Court's opinion in *Simpson v. Union Oil Co. of Calif.*, 377 U.S. 13 (1964), violate the mandate of this Court?

2. Assuming that this Court intended to allow Union Oil a showing of equities preventing liability to Simpson, was not the question precluded when Simpson showed that his gasoline prices were directed and controlled by Union Oil and that he was ousted from his service station business by Union Oil as a result of the enforcement of its illegal retail dealer consignment agreement program?

3. Has not this Court already declared that it is unconstitutional under U.S. CONST., art. III requiring that issues be resolved in concrete cases or controversies for the courts to refuse to give retroactive application of their decisions which bring about changes in law to the person who successfully litigated the issues in *Stovall v. Denno*, 388 U.S. 293 (1967), and does this not preclude the result below?

4. Does not this Court's opinion in *Simpson v. Union Oil Co. of Calif.*, supra, preclude the very equities urged by respondent of justifiable reliance on *United States v. General Electric Co.*, 272 U.S. 476 (1926), of asserted Department of Justice approval of the consignment agreement program in the Final Judgment in *United States v. Standard Oil Co. of California*, 1959 Trade Cases, ¶ 69,399.

and of Simpson's knowledge of respondent's consignment agreement program since these matters were all previously urged as preventing the actionability of petitioner's action and rejected by this Court?

5. Assuming this Court intended the last sentence in its decision in *Simpson v. Union Oil Co.*, supra, to apply to Union Oil Company of California even though it employed consignment agreements to fix prices coercively, ousting petitioner from the service station in June, 1958, are there any equities available to Union Oil Company who (a) sought the legal advice of its own general counsel as to the violative consignment agreement scheme rather than outside legal advice; (b) failed to require its counsel to render any legal opinion regarding its lawfulness in writing; (c) failed to make an analysis of a consignment price fixing system in terms of tying a retail price fixing consignment agreement to one year leases; (d) left the implementation of the price fixing consignment agreement to its marketing department without legal supervision; (e) assumed *United States v. Masonite Corp.*, 316 U.S. 265 (1942); *United States v. Richfield Oil Corp.*, 99 F.Supp. 280 (S.D. Cal. 1951), aff'd *per curiam*, 343 U.S. 922 (1952); had no relevancy to the situation; (f) admitted that termination of all business relations with errant dealers to effectuate plans in restraint of trade brought about treble damage antitrust cases; (g) determined to oust petitioner at the very time there existed a government complaint charging Union Oil Company with conspiring with six other major oil companies to monopolize trade and commerce in the Pacific States area and to fix and maintain retail prices by conspiracy in said area, and after the Department of Justice, Antitrust

Division, having obtained knowledge of the consignment agreement program amended its complaint in said antitrust case to specifically charge that Union Oil Company was using consignment as a means of implementing a price fixing conspiracy with other major oil companies; (h) ignored the recommendations of the House of Representatives Select Committee on Small Business, Subcommittee No. 5, 84th Congress, in 1955, that it issue three year leases, and of the said Committee, 85th Congress, in 1957, based, in part, on the complaints of dealers as to the coercive aspects of Union's consignment program that the Department of Justice investigate Union Oil Company's consignment agreement program for possible violations of the antitrust laws; (i) ignored the warnings brought about by the filing by the Federal Trade Commission thereafter of a complaint, in 1957, attacking the use of consignment to control retail prices on the part of another major oil company, Sun Oil Company; (j) failed to fully disclose the mandatory nature of its consignment agreement program to the House of Representatives, Select Committee on Small Business, Subcommittee No. 5, in 1957; (k) did not request and did not have any determination from the Department of Justice that its consignment agreement program was lawful; (l) had its attorneys interrogate the jury in the case below, after the verdict, to determine what occurred in the jury room, and filed affidavits which sought to directly impeach the jury verdict by disclosing what occurred in the jury room in the asserted failure to follow jury instructions.

6. Are not the Findings of Fact and Conclusions of Law of the trial Court based on incorrect legal premises and inconsistent with the mandate of this Court?

7. Is not the attempt of the Court below to establish a rigid rule of damages in service station lease ouster cases to a loss of fair market value after deducting a fair return on labor and capital to the lessee precluded by the violative scheme which embraces the use of short term leases to control pricing judgments of independent service station lessees and by the rule established by this Court and recognized in other appellate decisions that a person whose business has been destroyed may recover lost profits for a reasonable time in the future to be determined by the jury as a just and reasonable estimate based on relevant data?

8. May a new trial on the ground that the amount of the jury verdict was monstrous be ordered in the face of the above rules, after the trial court allowed into evidence data which was well within the range of the jury verdict, rendered instructions on damage law allowing a verdict of the amount rendered, and after this Court in *Simpson*, failed to support the Trial Court's judgment, resting, in part, on the ground that petitioner's damage claim of $150,000.00 was speculative and conjectural?

STATUTES INVOLVED

The statutes involved are Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2; Section 4 of the Clayton Act, 15 U.S.C. § 15. These are printed and attached to this petition as Appendix C herein.

STATEMENT OF THE CASE

A. The Trial

1. The ousting of Richard Simpson

Following the mandate of this Court in 377 U.S. 13 (1964), the case went to the jury on three issues, (1) The equities preventing retroactive application of the *Simpson* decision, (2) The McGuire Act and (3) The damages, if any, suffered (Tr. 207-212). During the trial defendant abandoned its McGuire Act defense (Tr. 1503).

Respondent Union Oil at all times herein, operated at least in the Pacific States Area consisting of the States of California, Oregon, Washington, Nevada, Arizona and portions of the intermountain area, Montana, Utah and Idaho (Pl. Ex. 1, R. 332-335). In the retailing of gasoline Union Oil Company, in part, leases real property locations or interests to independent business men who enter into business for their own risk and at the same time enters into gasoline supply agreements with them of its own choosing (R. 91, para. 10; Tr. 389-395). As of December 31, 1957, Union Oil supplied gasoline to 4133 retail stations in the above states. Of that figure, 2003 were leased by Union Oil and were subleased by an independent retailer. Of that figure, 2116 were owned by the retailer or leased by third persons (Id.). As of December 31, 1957, Union Oil had consignment agreements with 3305 dealers (Pl. Ex. 1; R. 334). It delivered in 1957 517,000,000 gallons of gasoline (Id.). At all times herein, Union Oil issued leases of one year only duration (Tr. 391).

Petitioner Simpson leased under a one year service station lease a Union Oil service station located at 4010

E. Ventura Avenue, Fresno, California, in May, 1956 (Tr. 580, Pl. Ex. 5). As a condition of obtaining the service station site, which was investigated by petitioner as a result of being offered any service station facility of respondent available in the State of California (Tr. 572, 576), Union Oil Company required Richard Simpson to sign a retail dealer consignment agreement which allowed Union Oil to direct his retail prices (Pl. Ex. 57; Tr. 393-394, 742). Union Oil renewed Simpson's one year lease in May, 1957 (Pl. Ex. 6).

Plaintiff protested price fixing under consignment agreement and requested he be able to purchase his gasoline (Tr. 608-609). About March, 1958, at a time when Mr. Simpson was having difficulties obtaining patronage because of highway construction in front of the station, stations around Simpson's station lowered the price of their regular gasoline from 34.9¢ per gallon to 27.9¢ per gallon. In order to meet this competition, petitioner, after requesting authorization from defendant, which was refused, lowered his price to 27.9¢ (Tr. 597-605). About a week later, Mr. W. S. Christopher, District Sales Manager, Fresno Area, called on plaintiff and told him that he was breaking the consignment agreement, demanded that Simpson raise his price to two cents above competition, 29.9¢. Mr. Simpson protested and Mr. Christopher said that he was going to call Los Angeles, get hold of Mr. Rath, and that he would do everything in his power to get plaintiff to get his prices up (Tr. 607). Mr. Simpson stated that he could not raise his prices (Id.). Union Oil admitted the substance of this conversation (R. 93). Following said conversation, plaintiff refused to abide by the

commands of Mr. Christopher and set his own retail price (Tr. 604-605). Mr. Campbell, his retail representative, called plaintiff and advised him if he would agree to conform to consignment program pricing, he would recommend his lease be renewed (Tr. 617-618). On or about April 22, 1958, plaintiff was notified his lease would not be renewed by defendant Union Oil Company (Pl. Ex. 55), and on or about May 9, 1958, Mr. Simpson received a formal notice from Union Oil's legal department that he vacate the premises and deliver possession of said premises to Union Oil Company (Pl. Ex. 56). At about this time, Mr. R. H. Rath, respondent's General Sales Manager (Tr. 280), appeared at Mr. Simpson's station where the following conversation took place, Tr. 622-623:

"Q. Right. What did Mr. Rath say to you during that conversation?

A. After pleasantries, how are you, so forth, he said that he had heard that I was not going to leave the station when my lease was up. I said, well, didn't know where he had heard it. He proceeded then to tell me that there were a couple of dealers in the Los Angeles area that had refused to leave, and that they had been thrown out bodily, and due to his previous association with me he didn't want to see me get hurt, and I said something about not thinking it was legal, and he said, 'Well, what can you do about it, you can't—you haven't got the money to make trouble and fight the Union Oil Company. Who do you think you are?'

Well, I was pretty upset over the whole thing, of course. Last thing I remember having said, 'well, you better keep it legal.' And I remember him saying, 'Whether we do or not, you're going out of the service station when your lease is up.'"

Plaintiff was unable to continue occupancy at the service station as of June 5, 1958, as a direct result of attempting to set his own retail prices (Tr. 623, 395, 471).

2. Damages suffered

Mr. Simpson during his first year of operations worked on the average 17 hours a day, 7 days a week. He opened at 7:00 a.m. and usually closed the station at 11 p.m. He employed one full-tiine man and an occasional part-time man (Tr. 586-587). During the second year Mr. Simpson worked on the average 12 hours a day with 7 days off for the entire year. Mr. Simpson found that he was starting to develop a fine clientele (Tr. 587).

Mr. Simpson had invested $3.700.00 in his business. He borrowed $2,000.00 from a bank and $1,600.00 from Union Oil Company on a conditional sales contract (Tr. 627-628). The money was needed for equipment, inventory of tires, batteries, automotive accessories and hand tools (Tr. 629-631).

Mr. Simpson testified that he lost as a result of the inability to a lease renewal the following items:

(1) $140.00 for purchase of a promotional kit which was of no value to him (Tr. 651-655).

(2) Union Oil increased the price of gasoline to Mr. Simpson during the period May 22, 1958 to June 5, 1958 by an amount of five and two tenths cents as to regular gasoline and four and seven tenths as to ethyl gasoline. This cost Mr. Simpson $331.34 (Pl. Ex. 60, Tr. 661-663).

(3) That he suffered a loss of $119.04 on the purchase and forced sale of equipment (Pl. Ex. 62; D's Ex. 1).

(4) That had he been able to establish his own retail prices free of the consignment program he would have maintained a six cents net (after 2¢ rent) minimum margin during the period May 1956 to March 1958. The difference between a six cent net minimum margin and what Mr. Simpson was actually able to obtain by way of commission resulted in a total net loss of $1,000.94 (Pl. Ex. 63; Tr. 670-674, and see Pl. Exs. 64, 65; Tr. 674-677).

(5) Mr. Simpson placed into evidence the computation of his gallonage gasoline sales, gross profits and net profits (Pl. Exs. 58, 58-A). Mr. Simpson testified that taking into consideration his experience in the oil business, especially in the retail business, as a Union Oil Co. retail representative, having known of stations that were high gallonage stations that were making good profit, that based upon talks with Union Oil Company representatives and their opinion of the service station site involved, and, further, on his own opinion of the service station site, with investigation, having determined that the highway was going to be reconstructed; that it was a major highway to a major park; that off ramps were being built from the major highway between San Francisco and Los Angeles onto the highway front of the service station; based upon the projection of the surrounding area and new construction of buildings and housings; the type of housing that was going on, based upon his own ability to build a good quality of business by way of loyal customers and based upon his own profit and loss statements, that he would have been able to make $10,000.00 a year for as long as he could work at 4010 East Ventura Avenue, Fresno (Tr. 686-695).

Petitioner also called as a witness Dr. Morton Paglin, a Ph.D. in Economics and a professor teaching economics, public finance, economic development statistics and other subjects in the field of economics (Tr. 748-749). Dr. Paglin has published books and articles in the field of economics (Tr. 751). Based upon background information given to Dr. Paglin, he determined a future performance projection for the service station site. Dr. Paglin determined that the months of June, July and August of 1957, wherein Mr. Simpson averaged 17,452 gallons of gasoline a month was a representative period to project gallonage and profits. In these three months Mr. Simpson averaged $809.00 per month as opposed to $433.00 for the same three month period in 1956, or an increase of 86.6% (Pl. Ex. 68). Dr. Paglin projected, based upon Mr. Simpson's record, that his income could be at least $9,700.00 a year until normal retirement at age 65 years. The value of such earnings for a 24 year period was placed at $147,895.00 (Tr. 764-765; Pl. Ex. 68, p. 5).

Dr. Paglin's original estimate was based upon using Mr. Simpson's actual performance data. At the trial plaintiff produced evidence that Union Oil Co. estimated the station to be able to produce 25,000 gallons a month in its third year of operation and thereafter (Pl. Ex. 71). Dr. Paglin then estimated, assuming sales of 25,000 gallons a month and assuming a margin of six cents per gallon, assuming normal increase in tires, batteries, lubrication sales, that net income would have increased to approximately $13,200.00 per year (Tr. 769).

In rebuttal to the testimony of Mr. Simpson and Dr. Paglin, respondent called as witnesses Mr. Arnstein and

Dr. Frank Kidner. Mr. Arnstein had been a CPA for 22 years with offices in San Francisco (Tr. 959-960). Mr. Arnstein testified there was no value to the service station business developed by Mr. Simpson because $473.00 should have been taken as offset earnings of Mr. Simpson (Tr. 982). Mr. Arnstein therefore concluded that Mr. Simpson made no net profits at the station and did not have a business of any value. Union Oil Company also called Dr. Frank Kidner (Tr. 1021). Dr. Kidner is a Ph.D. in Economics. At the time of trial he was a Professor of Economics at the Berkeley campus, University of California and Vice President of Educational Relations for the university (Tr. 1021). For the previous five years he had been a lobbyist for the university at the state level (Tr. 1664).

Dr. Kidner testified that the period June, July and August, 1957 were not representative months from which Dr. Paglin could have made projections (Tr. 1030-1033). On cross-examination Dr. Kidner admitted he did not know of the problems involved in the road construction at the station (Tr. 1036-1038); that Dr. Paglin was correct in excluding the first year as a starting up period or breaking in period of time in making his projection (Tr. 1038-1039). Dr. Kidner testified that he did not believe that Mr. Simpson developed any profit at the business and that even assuming a monthly average of $809.00 per month, that the business of Mr. Simpson would have no value (Tr. 1058-1059).

The jury thus had before the time of its decision the following: (1) the selection of the service station site by Mr. Simpson; (2) the time Mr. Simpson put in at

the service station during the two years; (3) his expenditures in advertising and giving of green stamps; (4) the development of a loyal clientele which resulted in Union Oil obtaining hundreds of letters supporting Simpson's position (Pl. Ex. 51, Tr. 490-500); (5) the testimony of the President of Union Oil Company, Mr. Reese Taylor, indicating that Union Oil would continue to give lease renewals to dealers who followed the policies of Union Oil Company (Tr. 274-278); (6) the location of the Union Oil station and its newness (Pl. Exs. 71, 72); (7) the Union Oil records which project gallonage and which indicate the desirable attributes of the service station involved (Id.); (8); Mr. Simpson's sales and profit records (Pl. Exs. 58, 58A, 67, D's Ex. 1); (9) the statistical study of Dr. Paglin projecting what Mr. Simpson's earnings would be (Pl. Ex. 68); (10) the rebuttal testimony of Mr. Arnstein and Dr. Kidner; (11) the estimated gallonage and profit to be made at the station as testified by Mr. Simpson (supra).

After closing argument the Court instructed the jury in pertinent part as follows (Tr. 1637):

> "A plaintiff whose lease and product agreements have been terminated as a result of conduct in violation of the antitrust laws is entitled to be awarded as damages the loss of profits resulting from such termination.
>
> If you find that Richard S. Simpson had developed profits at the service station at 4010 East Ventura Avenue, Fresno, California during the period of May, 1956 through May, 1958 and there was reasonable likelihood that such net earnings and profits would have continued in the future, you may award as damages reasonably anticipated future profits."

And at Tr. 1641:

> "In appraising Simpson's claim that the refusal by Union to give him further leases on the station leased by him from Union caused him damages, from which he seeks to recover, you should consider, or you may consider the following:
>
> 1. How long was it reasonably probable that Simpson would have stayed at the station had Union not refused to give him a lease in 1958?
>
> 2. What income, if any, would Simpson have realized during that period of time? and,
>
> 3. Was this sum any less than his earnings in other occupations since he ceased being a Union dealer?
>
> Mere speculation as to the possible profits of the business cannot be indulged in by the jury for purposes of finding a verdict in damages. The damages which the law contemplates must be reasonable damages ascertainable upon the evidence presented in the case. Before any verdict and damages can be returned there must be evidence of facts and transactions of some material and pertinent character from which the jury can ascertain that the plaintiff actually has been damaged."

The jury thereafter returned a verdict for $160,000.00 on February 17, 1967 (Cr. 297), the jury was polled and the verdict was unanimous (Tr. 1668).

3. The District Court's ruling as to the mandate of this Court

The mandate of this Honorable Court was filed in the District Court below on June 1, 1964 (Cr. 570). On January 25, 1965 plaintiff filed a motion for a special trial setting (Id.) Pretrial conference was ordered and was

held on August 26, 1965 (Tr. 1-30). At this hearing counsel for the respondent urged that the last sentence of this Court's opinion applied to Union Oil Company and proceeded to discuss the alternatives to be followed at a trial in the action (Tr. 8-11). Counsel for the petitioner urged that the last sentence of the mandate did not apply to Union Oil Company's employment of price fixing agreements, affecting pricing judgments of thousands of dealers coercively (Tr. 13-23). Defendant stated that the equities would show: (1) that Union Oil relied upon the established and settled law of the *General Electric* case; (2) that the Final Judgment in the case of *United States v. Standard Oil Co. of Calif., et al.* (D's Ex. P herein) looked upon the consignment arrangement as legal, and (3) that plaintiff himself, as an ex-retail representative of Union Oil Company, knew that consignment was the only method in which defendant did business (Tr. 24). Further pretrial conferences were held December 6, 1965 (Tr. 31-70) and May 17, 1966 (Tr. 71-109). At the latter hearing the District Court held that the Mandate of the Supreme Court in *Simpson* allowed defendant to present evidence showing whether the equities would warrant only prospective application of this Court's decision. The Court ruled that the defendant Union Oil Company could present the defense of the equities to the Court and to the jury (Tr. 98-99). The Court also ruled that the equity defense would be considered an affirmative defense and that the matter of presentation of proof rested with the oil company (Tr. 101). The District Court entered its pretrial order (Tr. 123-126) during the pretrial conference of June 20, 1966 (Tr. 135).

Petitioner thereafter sought a petition for writ of prohibition or mandamus or both in the alternative to preclude a trial on the "equities" in the Supreme Court of the United States, October Term, 1966, No. 553 Misc., *Richard S. Simpson v. United States District Court for the Northern District of California, Southern Division.* The motion for leave to file the writs was denied, 385 U.S. 806 (1966).

Thereafter the parties were called for a pretrial conference before the Trial Court, the Honorable Albert C. Wollenberg, on January 23, 1967 and January 24, 1967 (Tr. 137-206). At these hearings the trial Court announced its determination to submit the equity issue to the jury (Tr. 189). At the trial, however, the Court reversed itself and determined to decide the matter on its own (Tr. 1544, 1632-1633).

4. The Trial on the Equities

(1) 1950 to 1959—Union Oil was under charges of violating the Sherman Act Sections 1 and 2, based in part, on a conspiracy with all the majors operating in the Pacific States Area to control the pricing judgments of independent station dealers.

On May 12, 1950, defendant Union Oil Company together with other major oil companies in the Pacific States area; Standard Oil Company of California, Shell Oil Company, the Texas Company, Richfield Oil Corporation, General Petroleum Corporation, Tidewater Associated Oil Company were named in a civil complaint brought by the United States of America for conspiring to monopolize and to restrain interstate trade and commerce in the Pacific States area, amended on August 23, 1956 (Pl. Ex. 73; D's Ex. P). It was alleged that the de-

fendants conspired to fix and maintain crude oil prices, wholesale prices and retail prices on gasolines (Pl. Ex. 73, Amended Complaint, paras. 70 (a) (7), (8), 70 (a) (2); D's Ex. P, at pp. 1-2). The government alleged that these major oil companies controlled approximately eighty-six percent of the total number of retail service station outlets (Pl. Ex. 73, para. 60). In paragraph 62 of the Amended Complaint, the government specifically averred that *each* of the defendant majors did business with independent operators, yet by means of various leverage devices, and by means of a system of policing controlled the manner in which these independent businessmen operate their retail outlets. It averred that *each* of the defendant "majors" controls the price at which these independent operators resell gasoline and other refined petroleum products (Id., at p. 31). The government averred that the major oil companies have obtained and exercised effective control over 28,127 retail outlets operated by independent service station dealers (Id.). See also H.R. No. 1157, 85th Cong. 1st Sess., pp. 6-7, noted at 377 U.S. 19, fn. 5; Hearings, Id., Subcommittee No. 5, Part I, Washington, D.C., pp. 42-43, Paras. 211, 215, 217.

(2) Late 1954—Defendant determined to utilize price fixing consignment as a means of dealer price control based on cursory analysis of antitrust law by its own counsel.

Defendant called as its attorney who gave it advice as to its consignment program, Mr. L. A. Gibbons, General Counsel of Union Oil Company in 1954. Mr. Gibbons was also Vice President of Union Oil Company at that time (Tr. 1140). Mr. Gibbons testified that he was asked by the Vice President of Marketing of Union Oil Company, Mr. A. L. Stewart, whether the company could consign

gasoline to its retail dealers. Mr. Gibbons told him there was no objection to consigning gasoline and fixing retail prices thereby but that he would just double check it and talk to him about it later (Tr. 1142).

Mr. Gibbons testified he then examined some cases on the subject in the law library, particularly the case of *United States v. General Electric Co.*, looked at cases following that, and checked the California Civil Code with respect to factors (Tr. 1142-1143).

Mr. Gibbons then reported back to Mr. Stewart his opinion there was absolutely no legal objection to consigning gasoline (Tr. 1144). Whether or not Union Oil could tie a price fixing consignment agreement to a one-year lease, was not researched in these discussions with Mr. Gibbons (Tr. 1164). Whether or not Union Oil could insist that the dealer continue to remain a consignee dealer despite objections and a request from the dealer that he go on purchase and sale was not researched or discussed by Mr. Gibbons (Tr. 1176-1178). This was a matter of implementation to be left to marketing (Id.)

Whether or not Union Oil could refuse to renew the leases of dealers who did not follow consignment prices or who did not want to remain a consignment dealer was not discussed with Mr. Stewart (Tr. 1179).

The decision of this Court holding that companies who controlled a substantial number of service station properties could not utilize short term leases as a means of controlling independent judgments of the dealers who were considered independent businessmen was not considered relevant (Tr. 1159-1160). *United States v. Rich-*

field Oil Co., 99 F.Supp. 280 (1951), aff'd, per curiam, 343 U.S. 922 (1952). A copy of the complaint in *United States v. Richfield Oil Corp.*, supra, was marked as Pl. Ex. 77 for Id. and a copy of the decision and order in the *Richfield* case were marked as Pl. Exs. 76 and 78 for Id.

Mr. Gibbons further testified that he felt that the case of *United States v. General Motors Corp.*, 121 F.2d 376 (7th Cir. 1941) was inapplicable because it was viewed as a monopoly case which was far afield from the matters he was interested in (Tr. 1163-1164). He determined that the case of *United States v. Masonite Corp.*, 316 U.S. 265 (1942) was involved only with horizontal price fixing and, therefore, was inapplicable to the issue presented by Mr. Stewart (Tr. 1171-1173). Mr. Gibbons testified that the means to be used by Union Oil Co. to require the dealers to charge the prices directed by Union Oil Company under its consignment program was not discussed with Mr. Stewart and that such matters were left to marketing (Tr. 1179-1180).

Mr. Gibbons testified that his research did not include analyzing *Federal Trade Comm'n v. Beach-Nut Packing Co.*, 257 U.S. 441 (1922) (Tr. 1180-1181). With respect to the *General Electric* case, Mr. Gibbons admitted he did not check the Supreme Court record and that he gave no specific instructions to marketing to follow precisely the form used by General Electric Company as disclosed in the Supreme Court opinion (Tr. 1307-1309; 1322-1323).

Mr. Gibbons testified he believed it was not determinative to the validity of consignment selling as to who bore

the risk of price decline, that the question of who would carry insurance on the gasoline stock was not discussed with Mr. Stewart; that he did not believe that who carried the risks of handling, storing and selling gasoline was relevant in determining the overall problem of consignment merchandising (Tr. 1296-1324).

Mr. Gibbons did admit, however, that he was aware that the antitrust laws allowed private persons to bring cases arising from loss of dealerships because the defendant insisted upon the distributors or dealers following arrangements which restrained trade (Tr. 1382-1383). Mr. Gibbons testified also that he knew that the courts were not going to be bound by the word "consignment" in determining the validity of a price fixing agreement (Tr. 1297-1301).

Mr. Gibbons testified that none of his reports were put to writing, that he could not produce any written notes or memoranda concerning his discussions with Mr. Stewart (Tr. 1149, 1153).

(3) The Retail Dealer Consignment Agreement did not follow the General Electric form of agreement and the dealers absorbed price declines.

The agreement utilized, in fact, by defendant did not follow the *General Electric* form of consignment agreement. See *United States v. General Electric Co.*, 272 U.S. 476, 484. Thus, under Union Oil's consignment agreement program the dealer did pay for the gasoline when delivered (Tr. 533-535).

Under the Union Oil consignment agreement, UX EX 57, the dealer is to carry property insurance (para. 11,

and is liable for all expenses, costs, licenses and fees incident to or in connection with the handling, storage, sale and delivery of gasoline (para. 5). The dealer's commission in December 1954 at the beginning of the program was to be 4½c gross (before the payment of a 2c rental expense) per gallon on 76 gasoline (regular) and 5½c per gallon on 7600 gasoline (ethyl) (Pl. Ex. 2). This placed the risk of price decline directly on the dealer since before consignment, margin under purchase and sale was approximately 8c (Tr. 644). It was admitted that the initial commissions payable under the consignment program were insufficient for the dealer to live on (Tr. 945).

The dealer's commissions were increased to 6.5c and 7c on March 10, 1955 (Pl. Ex. 4, assuming that the dealer had a 5,000 gallon, or more, storage). By March 23, 1955, however, commissions were reduced to 5¼c and 5¾c (regular and ethyl respectively, Pl. Ex. 14). On April 7, 1955 commissions were based upon the dealer absorbing one half of the price drop with a minimum commission of 5c for regular and 5½c for ethyl (Pl. Ex. 15). On January 31, 1956, assuming a 5,000 gallon storage facility, the commissions were established at 5.25c, regular and 5.75c for Royal 76 (Pl. Ex. 21). In October, 1956, Union Oil authorized a 1.5c addition to minimum commissions, assuming a 5,000 or more storage facility (Pl. Ex. 26). On February 12, 1958, however, the commissions were reduced to four cents minimum with the dealer absorbing twenty percent of price reductions (Pl. Ex. 44). On February 28, 1958, Union Oil issued instructions that the consignment agreement would no longer show minimum commissions and a sliding scale commission was placed into

effect whereby the dealer absorbed two-tenths of a cent for every 1c drop in price (Pl. Ex. 38, and see Pl. Ex. 9).

When the dealer took an unauthorized add on to the consignment price, Union Oil issued instructions that his gasoline price should go up accordingly by the simple device of adding the increase to his delivery ticket (Pl. Ex. 9).

Price changes under consignment were to be used whenever Union in its sole discretion determined that a change in selling prices was needed (Pl. Exs. 3, 39, 9). The instructions were that the dealers were to change retail prices based upon what "major" competition was charging. The "Majors" in this context were defined by Mr. Rath as Standard Oil Company, Shell, Texaco, General Petroleum, Tidewater (Tr. 320-321).

Union Oil thus used consignment as a means of enforcing retail price directions so that the dealer's prices were based upon what the majors' prices were in a given zone or marketing area (Pl. Exs. 3, 15, 19, 38, 39, 9).

On rebuttal, petitioner called as a witness Mr. Joseph Alioto, a specialist in antitrust law, with offices in San Francisco, California. Mr. Alioto testified that it would be unreasonable for an attorney to render an opinion regarding Union Oil's consignment agreement program without consulting the *Masonite* case, without examining the tying device cases, cancellation of lease cases, refusal to sell cases and refusal to renew distribution agreements cases (Tr. 1442-1448).

(4) The House of Representatives, Select Committee on Small Business, Subcommittee No. 5 Investigations of Distribution Practices In The Petroleum Industry of 1955 and 1957, Involving Union's Consignment Agreement Program in 1957, and Testimony Therein.

In 1955 the House of Representatives Small Business Committee organized five subcommittees which were given specific fields for investigation which the Committee thought were most important to small business. Subcommittee No. 5 consisting of the Honorable James Roosevelt as Chairman, and the Honorable Tom Steed and the Honorable Timothy T. Sheehan, as members, were assigned the responsibility of investigating the problems of small business in the field of distribution. "Subcommittee No. 5 was specifically concerned with the problems which arise in the trade relations between numerous small and highly competitive firms on the one hand and a few large suppliers on the other hand." Conferences and interviews were held beginning February 1955 concerning complaints from retail gasoline dealers that they were free to manage their business only on the terms and conditions dictated by their large oil company suppliers. Such staff conferences and hearings with individual retail gasoline operators and with officers of their State and National trade organizations led to the decision of the said subcommittee to hold hearings on the alleged coercive and discriminatory practices. In substance, the retail operators or their trade association representatives complained that oil company suppliers engaged in discriminatory or coercive practices against their lessee dealers in order to enforce exclusive dealings in products sponsored by the oil company supplier and in order to acquire and main-

tain control over the retail market and the retail price of gasoline (Interim Report of Subcommittee No. 5 on Distribution Problems to the Select Committee on Small Business, H.R. No. 1423, 84th Cong. 1st Sess. July 26, 1955, Pl. Ex. 75 for Id., at page 1).

The Subcommittee recommended, in part, that all oil company suppliers consider the conversion of all leases with retail dealers who have had a satisfactory record of operation for a year or longer into leases with a minimum term of three years (Id., at page 3). The Subcommittee further found that company operated and C-type stations could be used for the purpose of market and price control by the major oil companies (Id., at page 17).[2]

[2]The Interim Report also stated at p. 17:

"The methods used by major oil companies in influencing retail prices of gasoline during price wars are varied but cumulative in effect. The testimony discloses numerous instances where retail operators with short-term leases from the oil company supplier are told by the company salesmen that they must get competitive and lower their price to meet a lower price in the area. In some instances the threat of lease cancellation or refusal to renew or conversion to C type stations were openly made if the retail operator did not reduce his price in compliance with the demands of the oil company salesmen.

In the C type stations, as in the company-operated stations, the company claims the right to legally fix the retail price. While not conclusive, the evidence does indicate that such company operated and C stations might be used for the purpose of controlling prices throughout a given trading area. It is stated in the testimony of company officials that one or only a few off-brand stations selling at the price differential below 2 cents from the brand stations, may start a price war. It would therefore follow that 1 or 2 company operated or C type stations strategically located could similarly force the lessee dealers of the same brand of gasoline to lower their price to that posted by the company or C type station. When the company, or C station lowers its price

Union Oil stipulated at the trial that the only manner in which a dealer in the pertinent period could obtain a service station facility was a one year lease with a retail dealer consignment agreement (Tr. 391).

Subcommittee No. 5 in the Spring of 1957 determined to investigate in part, complaints of "price manipulations practiced by some suppliers through company owned, consignment or commission operated outlets resulting in an economic squeeze upon small-businessmen regardless of price assistance or subsidy (Interim Report, Distribution Practices in The Petroleum Industry, H. R. Rep. No. 1357, 85th Cong. 1st Sess., Aug. 14, 1957; Pl. Ex. 80 at page 2, para. 8).

The Committee was then composed of the Honorable Tom Steed, Charles H. Brown, Timothy P. Sheehan, Craig Hosmer and James Roosevelt, Chairman (Id.).

The testimony of Mr. R. H. Rath, Union Oil's General Sales Manager, January 1956 to November 1958 (Tr. 280) was placed in the record (Tr. 1367-1375). The testimony of Mr. Rath given to the Select Committee on Small Business, Subcommittee No. 5, in Los Angeles, April 24, 1957 showed that Mr. Rath claimed that Union Oil Company did not pressure the dealers to accept the consignment price, that Union Oil Company only tried to sell at the price which he would want to sell the gasoline; that

> to meet the competition of a lower off-brand price than it would seem inevitable that all other lessee stations would be similarly forced to lower their prices. Accordingly, the committee does find that such voluntary operated and C type stations could be used for the purpose of market and price control by the major oil companies."

if he refuses to go along, Union Oil nominates the price at which he insists (Tr. 1369).

Mr. Rath testified the dealer is really free to sell at any price he wants (Tr. 1370); that if the dealer does not want to accept the consignment price, he becomes a purchase and sale dealer who simply says I don't want to be on consignment, I am cancelling and Union Oil says fine, and we keep selling him gasoline (Tr. 1373-1374). Mr. Rath testified that there was no relation between the basic lease and the retail dealer consignment agreement program (Tr. 1374).

Mr. Simpson, however, testified that he had requested of Mr. Pinocchi, Union's retail representative in Fresno, to go on purchase and sale on several occasions but was told that it was not possible because it was company policy to be on consignment (Tr. 608-609).

The Simpson record showed further that by October 1956, Union Oil had determined that the only way in which a lessee dealer could obtain service station lease or a service station lease renewal was by agreeing to become a retail dealer consignee (Pl. Exs. 7 and 8), and that Union Oil Company did not nominate Simpson's requested price of 27.9¢ in March, 1958 (Tr. 604-607), resulting in his retailing gasoline at a 4.6¢ margin (Tr. 892).

The Interim Report, supra, dated August 14, 1957, made recommendations, in part, as follows, p. 17, para. 4:

> "4. The Department of Justice investigate the present influence of consignment, commission and company operated stations in price leadership, maintenance or fixing, or in price discrimination against independent lessee dealers, as possible violations of the antitrust laws."

Thereafter, on November 8, 1965, the Federal Trade Commission filed a complaint against Sun Oil Company alleging that Sun Oil Company employed consignment agreements to fix, maintain and dictate prices of its gasolines through independent Sunoco retail dealers (Pl. Ex. 81 for Id.; Tr. 1370-1379).

(2) The numerous cases that the Department of Justice approved Union's consignment agreement program as lawful

Union Oil also called as a witness Mr. Morris Lasky, an attorney of record in this litigation, who testified that he believed the Department of Justice had legalized retail price fixing by the consignment device in the Final Judgment in *United States v. Standard Oil Co. (Calif.) et al.*, 1960 Trade Cases, ¶ 69,580 (D.C.S.D. Cal. 1958), 1249-1250, 1249-1250. The Department of Justice had written to Mr. Keith, counsel for Simpson, on February 12, 1960, stating that Mr. Lasky did not inquire whether the consignment practices of Union Oil were considered by the Department of Justice to violate the antitrust laws and Mr. Haddock, representative of the Department of Justice, expressed no opinion as to any such matter (Pl. Ex. 74 attached hereto as Appendix D). Further, Mr. Haddock stated that the letter of Mr. Lasky dated June 10, 1960 was not to be construed as a statement that the Department of Justice viewed Union Oil's consignment program as a lawful practice (Tr. 1249-1250).

(3) The Ninth Circuit's failure in the opinion sub nom to set a new trial

The Court did not enter a judgment on the jury's verdict following the verdict (Tr. 1111-1112). The Court

issue by itself, and scheduled hearings on the equities (Tr. 1670). The defendant thereafter, on March 10, 1967 filed its "Notice Of Motions For Judgment Notwithstanding the Verdict And For A New Trial" (Cr. 301-303). The motions were supported by affidavits of two jurors and the declaration of juror Elaine Grignon (Tr. 345-348). The affidavits and declaration were on their face obtained by counsel for the defendant who had obviously solicited the jurors to find out what had occurred in the jury room (see also Tr. 1784-1786).

Following the filing of the jury declarations plaintiff filed "Plaintiff's Motion For Entry Of Judgment, Determination Of Reasonable Attorney Fees, Striking The Affidavits And Declarations Of Jurors Marjorie Smith, William Price and Elaine Grignon" (Cr. 361-365).

Argument was thereafter held on the "equities" on April 28, 1967 (Tr. 1675-1804). The trial court denied plaintiff's motions and heard arguments on the equities. After argument the Court announced its ruling in favor of respondent and requested it prepare Findings of Fact, Conclusions of Law, and Orders (Tr. 1801-1804). The Court also ruled that the verdict was grossly and monstrously excessive and granted defendant's Motion for a New Trial (Tr.). It denied defendant's Motion For A Judgment Notwithstanding The Verdict.

The Court's reference therein to the questions from the jury that took place in the courtroom appear at Tr. 1660-1667. Thereafter the Court signed the Findings of Fact and Conclusions of Law submitted to it by the defendant, dated May 23, 1967, and entered the Orders and Judgment dismissing the complaint and, in the alterna-

tive, granting a new trial hereinabove described on May 23, 1967 (Cr. 540-550). These Findings of Fact may be categorized: (1) that Union Oil Company relied on the *General Electric* case and that it was reasonably to do so; (2) that plaintiff was an ex-employee of Union Oil Company, was familiar with the consignment agreement program; (3) that there were no coercive practices employed by defendant against plaintiff except in requiring him to sign and abide by a consignment agreement as a means of obtaining a one year lease and to allow his continued occupancy of the station (Cr. 544).

(7) Opinion of the Appellate Court

The opinion of the United States Court of Appeals for the Ninth Circuit made the following rulings:

(1) That there was no constitutional objection in the refusal to apply *Simpson v. Union Oil Company of Calif.*, 377 U.S. 13 (1964) to the plaintiff who litigated the issues of violations of the antitrust laws, injury and damages with the defendant.

(2) That under the last sentence of the decision in *Simpson v. Union Oil Company of Calif.*, supra, the trial court could hear the facts and render judgment in favor of Union Oil Company on the equities, dismissing plaintiff's complaint.

(3) The test to be applied and determined as to whether or not a jury verdict is to be enforced in favor of a person injured by a defendant's violation of the antitrust laws on the "equities", is, "did a party to the present litigation rely on a rule of law which has now been

changed, so that it would be inequitable to apply the new rule to such party".

(4) That the Supreme Court announced a new rule in *Simpson*. But the learned Court below did not analyze the existing state of the law in 1954 or 1958 governing Union Oil's conduct in the use of consignment agreements coercively employed.

It is noted that the learned Court below did believe that this Court would determine whether or not it intended the last sentence in *Simpson* to apply to Simpson himself. The Ninth Circuit stated, in pertinent part (p. ix):

> "There can be no doubt the Court intended 'when all the facts are known' to determine if the rule announced in *Simpson* should apply to that case. What the Court does, when this case again reaches it, will determine whether the *Simpson* rule is retrospective or prospective and whether it should be applied to the *Simpson* case."

(5) That the Findings of Fact on defendant's reliance upon *General Electric* were supported by the evidence. With respect to the attack on the findings by plaintiff that it was undisputed that the general counsel of Union Oil allowed his marketing department to determine the means to be used in requiring dealers to become consignees and the methods of enforcement of the consignment agreement program, the court stated, as follows (p. xix):

> "If the consignment agreements were then legal it would follow that Union would have a right to enforce them. One method of enforcement was refusal to deal with a consignee who breached his agreement. Thus Union refused to renew appellant's lease."

(6) The Ninth Circuit opinion also sustained the Order Granting a New Trial, stating that such an order would not be overturned absent a showing of clear abuse of discretion. The opinion, however, adopted a strict rule of damages applicable to cancellation of service station leases pursuant to programs violative of the antitrust laws. The Court rejected any recovery based upon loss of profits to Simpson and instead stated that the damages were restricted to loss of the market value of an operating business and not the loss of profits by appellant for his lifetime.

(7) The Court agreed with the trial court that a $160,000.00 verdict for refusal to renew a one year lease is monstrous and against the weight of the evidence.

REASONS FOR GRANTING THE WRIT

I

PETITIONER'S COMPLAINT HAS BEEN DISMISSED WITH PREJUDICE BASED UPON AN ERRONEOUS INTERPRETATION OF THIS COURT'S MANDATE IN SIMPSON v. UNION OIL COMPANY OF CALIF., 377 U.S. 13 (1964)

A. This Court has never sanctioned the prospective application of its antitrust decisions to the parties who have litigated all the issues necessary for the recovery of damages

1. The dismissal of Simpson's complaint based on the "Equities" was erroneous since the defendant was found in this Court to have violated the Sherman Act and it was not disputed at the trial that plaintiff lost his business as a result of defendant's enforcement of its illegal price fixing program unprotected by the Miller-Tydings Act.

There is clearly no authority for the learned Courts below to have assumed the power to dismiss Simpson's complaint with prejudice based on a reservation by this Court of prospective application of the Simpson decision

in the last sentence of the decision. Only the appellate court issuing its decision can make this determination (20 *Am. Jur.* 2d, *Courts*, § 233, p. 562 (1965, Supp. 1967). Thus in the criminal law field this Court has determined the retroactivity of its constitutional law rulings. At any rate, this Court said, "We reserve the question . . ." (377 U.S. at 24-25). A ruling by the Third Circuit in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 377 F.2d 776 (3d Cir. 1967) that it possessed the power to limit the retroactivity of prior antitrust decisions of this Court was not supported by this Court, 392 U.S. 481 (1968). This Court, instead reversed the Third Circuit in *Hanover* because of the erroneous interpretation of this Court's decision in *United States v. American Tobacco Co.*, 328 U.S. 781 (1946), but left undecided the question of the lower Court's power to limit the retroactivity of opinions of this Court. The judgments below are in conflict with this Court's Mandate, and it is respectfully urged the Honorable Court should rule upon the validity of the dismissal of Simpson's complaint. The following considerations are urged herein as supportive of the granting of this petition.

(1) The record showing the employment of consignment agreements coercively by Union Oil resulting in the destruction of Simpson's business precludes any showing of equities favorable to Union Oil. (2) The equities urged by Union Oil and supported by the Courts below were precluded by the decision of this Court in *Simpson*. (3) Even assuming that Union Oil did rely upon *United States v. General Electric Co.*, 272 U.S. 476 (1926) the lapse of and state of law some thirty years later prevents the Courts from holding that the reliance was

Honorable Court's rulings in *Simpson*. Thus, even assuming the Findings of Fact were procedurally proper under this Court's mandate in *Simpson*, they are in blatant conflict with antitrust principles as a matter of law as set forth in *Simpson*.

Finding of Fact No. 7, dealing with the coercive means used by Lincoln Mut. with reference to the plaintiff cannot be supported. *Federal Trade Commission v. Keppel & Bro., Inc.*, 291 U.S. 304 (1934); *United States v. Crescent Amusement Co.*, 323 U.S. 173 (1944); *Standard Oil Company and Standard Stations, Inc. v. United States*, 337 U.S. 293 (1949); *United States v. Richfield Oil Corporation*, 99 F. Supp. 280 (1951), aff'd per curiam, 343 U.S. 922 (1952); *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1 (1958); *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960).

I accepted the following: [illegible] the consignment agreement to a one year lease, it refused to allow Mr. Simpson to [illegible] purchase and sale, it refused a reasonable request of Mr. Simpson to lower his prices, it sent its District Manager to Mr. Simpson's station for the [illegible] that Lincoln would do all in its power to cause him to cease price cutting, it offered Mr. Simpson service station [illegible] renewal if he would follow the consignment program, and it dispatched its General Sales Manager to Mr. Simpson's station for the right to disparage him from bringing [illegible] [illegible] Mr. Simpson was to have been made a conspicuous example of the [illegible] of a service station dealer using Lincoln [illegible] [illegible] of its consignment agreement. [illegible] [illegible] of [illegible] dealer consignment agreements [illegible]

[illegible] was an unlawful means which prevented plaintiff from having free choice or free judgment as a matter of law, *Standard Oil and Standard Stations, Inc. v. United States, supra.*

The learned court below attempted to justify Finding of Fact No. 5 by giving as its reason:

> "We think the court's finding as to coercion was supported by the record, and that since the consignment agreement was lawful under *General Electric* it was also lawful to enforce it by refusal to deal and it need not renew the one year lease."

But this statement conflicts with Simpson in declaring that [illegible] clause of leasing only short time leases and then using the short term lease to deprive independent dealers of the exercise of free judgment whether to handle competitive products or not. [illegible] and in any event to sell at competitive prices was violative of the antitrust laws. *Simpson v. Union Oil Co., supra*, 377 U.S. at 16-17. The court has held that [illegible] consignment agreements exclusively in the use of their own [illegible] the short lease and [illegible] method of operation has resulted in the Federal Trade Commission [illegible] *Federal Trade Commission Report on Intercompetitive Practices* [illegible] 1967 [illegible] Report, p. 10). [illegible] *Federal Trade Commission v. Brown Shoe Co.*, 384 U.S. 316, 322 (1966) [illegible] *Federal Trade Commission v. Motion Picture Advertising Service Co.*, 344 U.S. 392, 394 (1953) [illegible] *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 720 (1948) [illegible] *Federal Trade Commission v. Raladam Co.*, 316 U.S. 149, 153 (1942) [illegible] *Federal Trade Commission v. Gratz*, 253 U.S. 421, 427 (1920) [illegible] *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U.S. 441, 453-454 (1922) [illegible] *Federal Trade Commission v. Sinclair Refining Co.*, 261 U.S. 463, 475 (1923) [illegible] *Federal Trade Commission v. Pacific States Paper Trade Association*, 273 U.S. 52, 63 (1927) [illegible] *Federal Trade Commission v. Keppel & Bro.*, 291 U.S. 304, 310 (1934) [illegible] *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 720 (1948) [illegible] *Federal Trade Commission v. Motion Picture Advertising Service Co.*, 344 U.S. 392, 394 (1953) [illegible] *Federal Trade Commission v. Brown Shoe Co.*, 384 U.S. 316, 322 (1966) [illegible] *Federal Trade Commission Report on Intercompetitive Practices* [illegible] 1967 [illegible] Report, p. 10). [illegible] *Federal Trade Commission v. Brown Shoe Co.*, 384 U.S. 316, 322 (1966) [illegible] *Federal Trade Commission v. Motion Picture Advertising Service Co.*, 344 U.S. 392, 394 (1953) [illegible] *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 720 (1948) [illegible] *Federal Trade Commission v. Raladam Co.*, 316 U.S. 149, 153 (1942) [illegible] *Federal Trade Commission v. Gratz*, 253 U.S. 421, 427 (1920) [illegible] *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U.S. 441, 453-454 (1922) [illegible] *Federal Trade Commission v. Sinclair Refining Co.*, 261 U.S. 463, 475 (1923) [illegible] *Federal Trade Commission v. Pacific States Paper Trade Association*, 273 U.S. 52, 63 (1927) [illegible] *Federal Trade Commission v. Keppel & Bro.*, 291 U.S. 304, 310 (1934) [illegible]

declared that service station dealers are subject to power leverages by their lessor suppliers and are by reason of the short term lease and supply agreements customarily forced to look to demands which limit their ability to operate as independent businessmen contrary to the protection given them under the antitrust laws. *Radovich v. National Football League*, [illegible] 352 U.S. 445 (1957).

The Court below also supported this finding by the statement that counsel stipulated that the only question involved was that of refusing to deal with a dealer who breached his consignment agreement (or a text). There is, it is respectfully submitted, no such stipulation. The Court is referring to portions of the Brief for Appellee, *Simpson v. Union Oil Co. of Calif.*, 1960 Trade Cases ¶ 69,558, pp. 77,855, in the References is thereto made to the pretrial conference of April 26, 1960 (R. [illegible]; Tr. 262-263). The discussion there referred to recites allegations in para. 28 (R. 37) of plaintiff's amended complaint relating to plaintiff's being compelled to accept a one year lease and being compelled to accept a consignment agreement. Plaintiff's counsel simply was stating that it was his view that the tying of the retail dealer consignment agreement to a short term one year lease coupled with actual compulsion of consignment as a matter of law. The stipulation was to counsel for appellee who thought that if the court regarded the consignment as a lease, then it was not necessary for this Court to find that plaintiff was in fact compelled to accept the consignment, but only that it was a lease and was actually so regarded with respect to the [illegible] agreements.

stipulation. The issue had been, indeed, resolved in favor of [illegible] Union's position in this stipulation that the injunction and threats directed against Simpson by Union was not to be considered coercive. (Tr. 1[illegible], 1[illegible].)

It was incorrect, further, to say that no agreement provided appellant must take all of its gasoline needs from Union. Appendix A, par. 6(a) and 7 gave Union reserved rights to the station as long as Union and only Union offered gasoline (except pursuant to rights under the agreement). If Simpson [illegible] all of its gasoline requirements from Union, Union would [illegible] pursuant to rights under the agreement. (R. 98, [illegible] Tr. 1[illegible], 1[illegible].)

II. The equities urged by Union Oil Company were precluded by the decision of this Court in Simpson

The decision of this Court did not allow Union Oil to successfully argue that it relied upon General Electric and Simpson was completely predictable

[illegible]

3. **There is no equity that Richard Simpson knew of Union Oil Company's Consignment Agreement Program.**

This claimed equity was clearly foreclosed by this Court in *Simpson*. This Court was unanimous in holding that Simpson's knowledge of the consignment agreement did not defeat Union Oil Company's liability to him.

The Trial Court made Findings of Fact with respect to the plaintiff's knowledge of the consignment agreement program in complete contradiction to the teachings of this Court in *Simpson*. It further ignored altogether Mr. Simpson's testimony that he was told by Union Oil's District Manager, Mr. Chapman, that,

> "... Mr. Chapman told me he did not want me to go out and talk to the dealers about the consignment program until he gave me the go-ahead, because he believed that there would be trouble over it. He did not think that it was legal. And he did not think that we could sell it to the dealers in the Santa Maria district because it would cut their profit." (R. p. 613-614.)

Nor did the Trial Court acknowledge the testimony of Mr. Simpson following a jury verdict in his favor that Mr. Bath, General Sales Manager of defendant, told him whether Union kept it legal or not, Mr. Simpson was going out of the station. (Tr. 625.)

C. **Even assuming that Union Oil did rely upon General Electric the existing state of law in 1954 or 1958 prevents the Courts from holding that the reliance was justifiable or in good faith.**

Clearly *Simpson* was not innovative, and had General counsel for Union Oil examined the decisions of his own industry, he would have found the very authorities which precluded any different result in *Simpson*. In *Tidal Oil Co.*

Line Corporation v. United States, 368 U.S. 336 (1949), this Court held that a patentee could not condition a license so as to control conduct by the licensee not embraced by the patent monopoly, or upon maintenance of resale prices by the purchaser of the patented article (at pp. 156-157). The Court stated at p. 158:

> "Agreements for price maintenance of articles moving in interstate commerce are, without more, unreasonable restraints within the meaning of the Sherman Act because they eliminate competition."

In *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), this Court declared that the oil industry's with its claim of special market deterioration problems had no special exemption from the Sherman Act's prohibitions against agreements to fix and control prices.

This Court's analyses of major oil companies' dealings with independent service station lessees in *Standard Stations, Inc.*, *supra*, and *Richfield*, *supra*, resulted in clear doctrine that the oil companies, having chosen to do business through independent service station lessees and possessing a substantial number of retail outlets which are supplied with millions of dollars of gasoline or alternative accessories products, could not enter into arrangements which restrained the exercise of independent judgments by these thousands of dealers. Socony-Vacuum and these service station cases were clear teaching that Union Oil could not lawfully carry out retail price administration under the circumstances disclosed here. There established that the teaching of *Miracle* would be applicable to service station dealers who would be viewed as independent business entities.

Here, using the tests of *Hanover Shoe*, Sampson did not indicate that the issue involved was novel, that innovative principles were necessary to resolve it, or that the issue had been settled in prior cases in a manner contrary to the view held by prior Courts.

The Sixth Circuit opinion in *Rhodes Pharmacal Co. v. Federal Trade Commission*, 348 F. 2d 909 (6th Cir. 1965), is instructive. The Court stated at page 911:

> "This effort may prove to be [either a formidable undertaking], since as is [so often] the case, [when] a trend toward the Union and holding [has] been plainly foreshadowed [in the Federal Trade Commission's opinion in the instant case demonstrated by such cases as United States v. Pabst Brewing Co., 384 U.S. 546, 86 S. Ct. 1665, 16 L. Ed. 2d 765 (1966), United States v. Von's Grocery Co., 384 U.S. 270, 86 S. Ct. 1478, 16 L. Ed. 2d 555 (1966), United States v. Philadelphia National Bank, 374 U.S. 321, 83 S. Ct. 1715, 10 L. Ed. 2d 915 (1963), United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 64 S. Ct. 805, 88 L. Ed. 1024 (1944), and United States v. Parke, Davis & Co., 362 U.S. 29, 80 S. Ct. 503, 4 L. Ed. 2d 505 (1960)]."

II

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH UNITED STATES CONSTITUTION ARTICLE III, THE DOCTRINE OF SEPARATION OF POWERS AND THE SUPREMACY OF THE JURY ON ISSUES OF FACT, AMENDMENT VII

A This Court has declared that the Constitution requires that parties who bring about an innovative principle of law are entitled to the benefits of the rule announced.

1 In the area of criminal law, this Court has declared that the Constitution prohibits denying to litigants who establish a new constitutional rule the benefits of his litigation.

tional defense prior to the announcement of a decision which might support it cannot prevent a litigant from later invoking such a ground. *Curtis Publishing Company v. Butts,* 388 U.S. 130 (1967). (2) These must be an effective waiver of a known right or privilege *(Id.)*. (3) The constitutional violation appeared from the record. (4) The constitutional violation here was involved with an interpretation of a mandate of this Court which involved principles of appellate decision making as well as constitutional objection. (5) The decision in *Stovall* (June 12, 1967) was not made applicable until after the hearings on the equities on April 28, 1967 and the signing of the judgment on May 23, 1967 (Cr. 550). This Court in *Butts,* supra, specifically held that constitutional claims could be raised after trial to advance arguments raised by recently announced Supreme Court decisions.

2. The Doctrine of Separation of Powers prevents prospective application of the Sherman Act to persons injured by a violation of the Sherman Act.

It is further respectfully urged that the application of the prospectivity doctrine to federal statutes which declare that every person who has been injured by the violation of an Act of Congress shall have recovery, expressed in Section 4 of the Clayton Act, is unconstitutional when it denies process to a person injured by a violation of the Congressional rule. The federal judiciary has no authority under the Constitution to prevent an injured party from his remedy under any of Congress' statutory declarations of rights. This Court made it clear in *Simpson* that the Congress, not the oil company, is the arbiter of public interest, and that Union Oil could not

administer prices in face of the prohibitions of the Sherman Act.

3. The jury verdict necessarily precluded a judgment on the equities against Simpson.

Further, it is respectfully submitted the Court below could not constitutionally dismiss plaintiff's complaint following a jury verdict in his favor. The jury's determination of fact cannot be reexamined by any Court under the Seventh Amendment unless according to the rules of common law. *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948), *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959). *Beacon*, it is respectfully urged, prevents a Court determination of equities following a jury verdict which necessarily raises factual conflict with that jury determination. There can be no inconsistent equities to defendant following the jury's finding that the destruction of Simpson's business opportunities as a result of defendant's violation of the Sherman Act caused the suffering of extensive damages.

III

EVEN ASSUMING THAT THIS COURT DID INTEND TO HAVE ITS DECISION OPERATE PROSPECTIVELY IN SIMPSON, THE DEFENDANT HAS ACTED COERCIVELY AND CAN OFFER NO EQUITIES IN VIEW OF ITS DECISION TO RISK THE VALIDITY OF ITS CONSIGNMENT AGREEMENT PROGRAM

A. Union Oil took a calculated risk as to the lawfulness of its retail price fixing by the consignment device in the face of protesting dealers and governmental investigation; its counsel was negligent in analyzing the existing state of law, and the record showed an unethical and unauthorized filing of affidavits of jurors in an attempt to show that the jury failed to follow the Court's instructions.

As seen above, Union Oil Company could not rely upon the sole decision of this Court in *General Electric*. It instead determined to assume all the risks of antitrust violation which the record clearly showed. See Questions Presented, No. 5; discussion under heading "The Trial on the Equities", supra, and I, B, supra.

In addition, it is urged that the denial of plaintiff's motion to strike the affidavits or declaration of jurors Smith, Price and Grignon (Cr. 361-365) may be properly presented in this section. The record here is that Union Oil Co. determined to achieve its marketing policies regardless of whether "It was kept legal" (Tr. 622-623). Following the verdict, Union Oil determined to introduce unauthorized affidavits into the record on a motion for a new trial. Mr. Simpson was intimidated and threatened by Union Oil Co. and he lost his business because he stood his ground (Tr. 471, 603-608, 617-623). It is respectfully urged that Mr. Simpson is entitled to have a jury determine his damages, and that jury is to be free of harass-

ment and interviewing by Union Oil. There can be no question that Mr. Simpson is to be free from an attack on his verdict based on the failure of the jury to follow the Trial Court's instructions. There is no authority allowing a party the right to impeach a jury's verdict by showing what occurred in the jury room based on asserted failure to follow jury instructions. *McDonald v. Pless*, 238 U.S. 264 (1915); *Northern Pac. Ry. Co. v. Mely*, 219 F.2d 199 (9th Cir. 1954). In *Mely* the Ninth Circuit stated at 202:

> "We do hold for future guidance that it is improper and unethical for lawyers, court attachés or judges in a particular case to make public the transactions in the jury room or to interview jurors to discover what was the course of deliberation of a trial jury."

The Court below ignored the threat to the jury system disclosed in this record. As stated in *McDonald v. Pless*, supra, at p. 268:

> "For, while it may often exclude the only possible evidence of misconduct, a change in the rule 'would open the door to the most pernicious arts and tampering with jurors.' 'The practice would be replete with dangerous consequences.' 'It would lead to the grossest fraud and abuse' and 'no verdict would be safe.' * * *"

The time has now come to say that powerful corporations are tampering with the very core of justice. Cf. *Stein v. New York*, 346 U.S. 156, at p. 178 (1953).

IV

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH AN ESTABLISHED RULE OF DAMAGE LAW APPLICABLE TO ANTITRUST CASES WHICH ALLOWS THE RECOVERY OF LOSS OF PROFITS FOR A REASONABLE PERIOD OF TIME IN THE FUTURE FOLLOWING THE DESTRUCTION OF A BUSINESS ENTERPRISE BY CONDUCT IN VIOLATION OF THE ANTITRUST LAWS

A. Service station dealers subject to short term leases are entitled to the recovery of damages based on the value of their anticipated future profits when they have been dispossessed by owner-supplier's violation of the antitrust laws.

This Court has made clear in *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931; *Bigelow v. RKO Radio Pictures*, 327 U.S. 251 (1946), and in the recent cases of *Zenith Radio Corp. v. Hazeltine Research, Inc.*, ... U.S. ....., 1969 Trade Cases, ¶ 72,800 and *Perkins v. Standard Oil Co. of Calif.*, ... U.S. ....., 1969 Trade Cases, ¶ 72,822 that once a violation of the antitrust laws has been proven, and that that violation has proximately caused injury the jury may make a just and reasonable estimate of the damages based upon relevant data, and render its verdict accordingly. In said circumstances, juries, acting upon probable and inferential, as well as direct and positive proof, are allowed to award as damages loss of anticipated profits to a business that has established profitability. The Tenth Circuit in *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561 (10th Cir. 1962) at p. 595, made no objection to the trial Court's instructions as to the listing of damages which may be recovered by the private litigant as follows:

(1) the expense involved in establishing a new business, (2) the increased cost incurred in running the business by reason of antitrust violations, (3) the inability to make profits which would otherwise have been made but for such violations, and (4) the diminished value of the appellee's business by reason of being excluded from the market.

The Court stated at p. 595:

> "We know that loss of profits and diminishment of assets are proper elements of damage, and we know too that the owner of the affected business is competent to testify concerning his opinion of damages."

In *Rankin v. Associated Bill Posters,* 42 F.2d 152 (2nd Cir. 1930), cert. denied, 282 U.S. 864, the Circuit Court sustained an award of damages based upon estimated lost profits for the period July, 1913 to June 1918 as a result of the plaintiff's being unable to solicit virtually the entire available business; and in the companion case of *Ramsey Co. v. Associated Bill Posters,* 42 F.2d 152, allowed the awarding of damages for lost profits for a similar period solely based upon the evidence showing plaintiff's profits prior to the impact of the defendant's violation.

In *Twentieth Century Fox Film Corp. v. Brookside Theatre Corp.,* 194 F.2d 846 (8th Cir. 1962), cert. denied, 343 U.S. 942, the Circuit Court sustained an award of lost profits to a theatre operator who entered into a fifteen year lease on March 1, 1937. The Court approved instructions that the lessee operator was entitled to an award of damages based upon his losses as of the day he lost his lease in 1937 and allowed as one of the ele-

ments an estimate of damages based on the amount of profits made by the wrongdoing defendant during the subsequent twelve year period at the theatre. An award of $317,478.02 was sustained, the Court stating, in pertinent part, at 194 F.2d 856:

> "Ordinarily it is the exclusive function of the jury to fix the amount of damages."

Another panel of the Ninth Circuit, in *Lessig v. Tidewater Oil Co.*, issued January 2, 1964, 327 F.2d 459, cert. denied, 377 U.S. 993, announced the rule in dealer lease cancellation cases, as follows, p. 464:

> "The evidence supporting Lessig's claim of injury prior to the termination of his lease and contract from Tidewater's resale price fixing activities was not strong. However, the jury could readily infer that Tidewater terminated its business relationship with Lessig because he failed to adhere to the resale price-fixing scheme. Cancellation of Lessig's lease and dealer contract in such circumstances would be unlawful, though in exercise of a right expressly granted Tidewater by the lease and contract. Lessig could claim compensation for the resulting loss, including reasonably anticipated future profits, and there was evidence from which the jury could find that such a loss occurred."

It is respectfully submitted that the Court below has wrongfully denied the ability of a plaintiff operating under a short term lease, which is a constituent element of an unlawful scheme, to claim the value of the loss of reasonably anticipated future profits as an item of damage in a private treble damage action following the destruction of his business. The decision is in conflict with

the decisions of this Court, another panel of the same Circuit, and other Circuits.

The jury verdict is to be supported in that it alone (1) could determine whether Mr. Simpson would have stayed as an efficient dealer at the station during his working life (not his life expectancy) for a 24 year period, and (2) what the reasonably anticipated profits were.

Further, the service station dealer cannot be limited to a market valuation approach, when he has been dispossessed unlawfully since he is entitled under damage law to the greater of market value or values personal and unique to him. See Restatement, Torts, §§ 911, 927 (1939).

This Court's opinion in *Simpson* forewarned defendant of an award of large damages since it did not support the Trial Court's determination that the damage theories of Simpson were conjectural and speculative (R. 358).

V

THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING A NEW TRIAL

It is respectfully urged that the Trial Court erred in granting a new trial on the basis of the amount of damages awarded when it allowed into evidence relevant data from which the jury could award the very amount of damage that it did award. The Trial Court allowed in evidence estimates of Mr. Simpson's loss of profits for a 24 year period, based upon data in the record, by Mr. Simpson and Dr. Paglin. Its instructions were not at-

tackable by respondent and allowed the jury to arrive at a figure in the amount it did render. The amount of damages suffered is exclusively within the province of the jury and should not be set aside if it can be sustained from any point of view. *Perkins v. Standard Oil Co. of Calif.*, ... U.S. ....., 1969 Trade Cases, ¶ 72,822; *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931); *Liquid Veneer Corp. v. Smuckler*, 90 F.2d 196 (9th Cir. 1967).

CONCLUSION

It is respectfully urged for the foregoing reasons that a Writ of Certiorari be granted.

Dated, San Francisco, California,
July 25, 1969.

MAXWELL KEITH,
JAMES J. DURYEA,
Attorneys for Petitioner.

(Appendices Follow)

Appendix A

United States Court of Appeals
for the Ninth Circuit

Richard S. Simpson, Appellant, vs. Union Oil Company of California, Appellee.	No. 22,148

[April 30, 1969]

Appeal from the United States District Court
Northern District of California

Before: JERTBERG, DUNIWAY and CARTER, Circuit Judges,

JAMES M. CARTER, Circuit Judge.

This case has been here before. It is an action for damages under the antitrust laws. On the first occasion the motion of Union Oil Company (hereafter Union) for summary judgment was granted. (1961 Trade Cas. Par. 69,936, p. 77,693). We affirmed. *Simpson v. Union Oil Company of California*, 311 F.2d 764 (1963). Certiorari was granted and the Supreme Court reversed 5-3, and remanded for further proceedings. *Simpson v. Union Oil Company of California*, 377 U.S. 13 (1964); rehear. den. 377 U.S. 949.

The case involved Union's consignment of gasoline to service stations as a method of price maintenance. Since most of the problems resulting from the remand arise from language in the Supreme Court decision, supra, we quote pertinent parts:

> "Hence on the issue of resale price maintenance under the Sherman Act there is nothing left to try, for there was an agreement for resale price maintenance, coercively employed.
>
> The case must be remanded for a hearing on all the other issues of the case, including those raised under the McGuire Act, 66 Stat. 631, 15 U.S.C. 45, and the damages, if any, suffered. We intimate no views on any other issue; . . . We reserve the question whether, when all the facts are known, there may be any equities that would warrant only prospective application in damage suits of the rule governing price fixing by the 'consignment' device we announce today." 377 U.S. at 24-25.

After remand and following a pretrial order of June 20, 1966, in the district court, appellant sought in the Supreme Court, a writ of prohibition or alternately a writ of mandamus, to preclude Union from asserting any "equities" which warrant prospective application of the *Simpson* decision, 377 U.S. 13, supra, in any other court than the Supreme Court.

In the pretrial order above, the district court foreclosed the issues of whether Union had "attempted to monopolize" the wholesaling and retailing of gasoline in violation of Sec. 2 of the Sherman Act, and whether Union had unlawfully tied the sale of petroleum products to its leases in violation of Sec. 1 of the Sherman Act or en-

tered into exclusive dealing contracts with its dealers. Accordingly, appellant also sought a writ in the Supreme Court, compelling the district court to try the aforesaid excluded issues. The applications for both writs were denied. *Simpson v. United States District Court,* 385 U.S. 806 (1966).

The case went to trial before a jury during January and February 1967 and resulted in a verdict for appellant against Union for $160,000. The trial court had reserved the "equities" issue for court decision. Union filed a motion for judgment N.O.V. and a motion for new trial. Appellant filed a motion to enter judgment upon the verdict. The trial court decided the "equities" issue in favor of Union; denied appellant's motion for judgment on the verdict; denied Union's motion for judgment N.O.V., but granted Union's motion for a new trial.

The trial court made findings of fact and conclusions of law on the "equities" issue, reported in *Simpson v. Union Oil Company of California,* 270 F. Supp. 754 (N.D. Cal. 1967). By Finding 14 it found

> "On all the facts as they now have been made known by the trial of this case, it would be unfair and inequitable to apply to this damage action, wherein the opertive facts all arose in the years 1956-1958, the rule respecting price-fixing by the consignment device announced on April 20, 1964, in *Simpson v. Union Oil Company of California,* 377 U.S. 13."

Its Conclusions 2 and 3 read

> "2. The belief of defendant prior to April 20, 1964 that the Retail Dealer Consignment Agreements between itself and retail gasoline dealers and the ac-

tions taken by it pursuant thereto were entirely lawful under the antitrust laws was reasonable and warranted by *United States v. General Electric Company*, 272 U.S. 476 and other authorities."

"3. The equities warrant only prospective application to damage suits of the rule respecting price fixing by the consignment device announced on April 20, 1964 in *Simpson v. Union Oil Company of California*, 377 U.S. 13, and, particularly, do not warrant application of said rule to this case."

The court then entered its written Orders and Judgment. By the judgment

"plaintiff's action herein against defendant is dismissed with prejudice.[1]

Its order with respect to a new trial was that "defendant's motion to set aside the verdict on said issues [the issues submitted to the jury] and to grant a new trial thereon should a further trial be necessary is hereby Granted."

In substance, the trial court denied appellant a judgment on the verdict because of its findings and conclusions on the "equities" issues; but hedging against possible reversal on this portion of the case, set aside the verdict and granted a new trial.

The Questions Presented

1. Should the *Simpson* decision, (377 U.S. 13) be applied only prospectively and not to this case?

---

[1]The motion for judgment N.O.V. was denied because the trial court stated there was "some" proof of damage. This concerned issues submitted to the jury. The dismissal of the action was on the "equities" issue, decided by the court and not submitted to the jury. There is no inconsistency.

2. If the dismissal of the action was error, was there also error in granting a new trial?

Other questions have been abandoned.[2]

I.

SHOULD THE SIMPSON DECISION HAVE ONLY PROSPECTIVE APPLICATION?

(1) *Constitutional objections.*

We treat at the outset contentions by appellant purportedly raising constitutional questions. Appellant claims that the trial court ruling that the "equities" are in favor of and compel a prospective application of the Supreme Court decision in *Simpson,* runs afoul of constitutional provisions. Appellant argues "courts are without power under the United States Constitution, requiring the separation of powers between legislature and the courts to take away or render nugatory a federally created right to obtain damages for an injury from a defendant's violation of the Sherman Act;" that to deny appellant

---

[2]At the trial Union withdrew the McGuire Act defense referred to in the Supreme Court order of remand.

As to the precluded issues, "attempt to monopolize" and "tie in sales to leases," they are not discussed in the briefs, although referred to in appellant's "Statement of the Case" and "Specifications of Error." They are "deemed abandoned and need not be considered herein," *Peck v. Shell Oil Co.,* 142 F.2d 141, 143 (9 Cir. 1944).

Moreover if the trial court was wrong in its decision as to the "equities" but was correct in granting a new trial no harm has been done appellant.

Appellant attempted to inject these issues in the case in 1966, 8 years after the case started and after Simpson had filed a Pretrial statement in 1965 which had *not* contained them. The trial court properly excluded them as untimely and as injected "solely because of plaintiff's dissatisfaction with the court's ruling" on the "equities" issue, and thereby protracting the trial. The trial judge acted properly.

relief is to deny him due process of law; and that setting aside of the verdict and the granting of judgment to Union denied appellant due process of law.

A short answer is that no constitutional questions were raised or argued in the court below and therefore cannot be presented and need not be considered here. *Williamson v. Weyerhaeuser Timber Co.*, 221 F.2d 5, 14 (9 Cir. 1955).

It appears appellant is contending that every decision must operate retrospectively. This is based on an old archaic concept, now generally rejected. That concept is that the law has always been fixed and unchangeable and that where a court finds past interpretations are incorrect and proceeds to make a declaration of the law different from the past, the new rule applies to past events.

Judge Cardozo was one of the first to characterize the concept as unrealistic. See the discussion in *United States v. Fay*, 333 F.2d 12, 15-16 (2 Cir. 1964) affirmed sub nom., *Angelet v. Fay*, 381 U.S. 654 (1965). The Supreme Court has recently said in *Linkletter v. Walker*, 381 U.S. 618, 629 (1965) "the Constitution neither prohibits nor requires retrospective effect." *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932) was an early case where a lower court refused to make its decision retrospective and Justice Cardozo, writing for the Supreme Court, rejected constitutional contentions. (p. 364).

As to the contention that appellant had been deprived of a jury trial, the short answer is the record below. This constitutional claim was not raised below and cannot be considered here, *Williamson v. Weyerhaeuser*, supra; *Cox v. City of Freeman*, 321 F.2d 887, 891 (8 Cir. 1963).

Likewise a court may set aside a verdict without constitutional encroachment. Neither the granting of the new trial nor the judgment as non-retroactive impinged on the constitutional provisions relied on by appellant.

(2) *The Trial Court Properly Considered and Ruled on the Equities Issue.*

The issue of the "equities" was properly before the trial court on remand. The Supreme Court said, ". . . when all the facts are known, there may be any equities that would warrant only prospective application . . . of the rule . . . we announce today." Obviously, the court was speaking of the *facts of this case*. There is no indication or reason to believe they were speaking *only* of *facts of other damage suits as they might arise in the future*. The 5th Circuit in *Guidry v. Continental Oil Company*, 350 F.2d 342, 344 (1965) stated that the reservation in *Simpson* "seemingly refers to the inequity to subjecting the Union Oil Company to a triple damage action for conduct that was apparently legal until the narrowing of *United States v. General Elec. Co.*, 1926, 272 U.S. 476, 47 S.C. 192, 71 L.Ed. 362."

It is traditionally the function of the trial court to find the facts. The Supreme Court is ill equipped to carry out the fact finding process[3] and it would be absurd to read the Supreme Court's language to mean that the Supreme Court would take evidence and find the facts as to whether "equities" existed.

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[3]In actions by one State against another State, of which the Supreme Court has original jurisdiction, masters are appointed by the Supreme Court to initially find the facts and report to the court.

The trial court properly took evidence, and made findings of facts and conclusions of law as to whether there existed "equities that would warrant only prospective application . . ." of the rule the Court announced in *Simpson*. We think this was what the Court intended.

This fact finding was clearly to be performed by the trial judge and not by the jury. Moreover this duty was urged on the trial court by appellant and no objection as required by Rule 51, F.R.Civ.P., was made, when the court instructed the jury that the issue was taken from the jury and that the court would decide it.

(3) *The Test to Determine if the Simpson case should be Retrospective or Prospective in Application.*

Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 88 S. Ct. 2224, 20 L.Ed. 2d 1231 (1968) held that *American Tobacco Company v. United States*, 328 U.S. 781 (1946) (in approving Judge Learned Hand's *Alcoa* analysis of "monopolization" as a violation of Section 2 of the Sherman Act in *United States v. Aluminum Company of America*, 148 F.2d 416 (2 Cir. 1945)), had not altered the law of monopolization and that the problem of the retrospective or prospective application of a new rule of law was not involved in the case.

Appellant summarized language in *Hanover* (and Union agrees), as follows:

> "In its analysis of the issue the Supreme Court stated that the defense to liability under the Sherman Act because of reliance upon prior law could not even be raised unless (1) there was a clearly declared judicial doctrine, (2) upon which a defendant relied and (3) under which its conduct was lawful,

(4) a doctrine which was overruled, (5) in favor of a new rule according to which conduct performed in reliance upon the old rule would have been unlawful."

Generally, as to the problem of prospective application of a new rule of law ". . . the Constitution neither prohibits nor requires retrospective effect." *Linkletter v. Walker,* supra; and *Great Northern R. Co. v. Sunburst Oil & Refining Co.,* supra. Three alternatives were available in the instant case. The Court could have said, but did not (1) that the rule applied to *Simpson* and all other cases prospectively; or (2) not to *Simpson* but to all other cases prospectively or (3) retrospectively to *Simpson* and all other cases.

There can be no doubt the Court intended "when all the facts are known" to determine if the rule announced in *Simpson* should apply to that case. What the Court does, when this case again reaches it, will determine whether the *Simpson* rule is retrospective or prospective and whether it should be applied to the *Simpson* case.

In *Linkletter v. Walker,* supra, the Court said, "Once the premise is accepted that we are neither required to apply, nor prohibited from applying, a decision retrospectively, we must weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." (p. 629).

Although the Court also said ". . . no distinction was drawn between civil and criminal litigation," (p. 627) the Court meant that in either a civil or criminal case, the new decision might be retrospective or prospective

depending on the determination of the factors set forth above.

We think that under the reasoning of *Linkletter*, supra, in applying the test set forth, there are various distinctions between civil and criminal cases bearing on the question as to whether the rule should be applied to the case at bar.

In the criminal case, whether the question arises on direct or collateral attack, the defendant has been convicted of a crime and the decision to be made is, the validity or invalidity of the conviction. That decision must be made in the particular case then on appeal or review. The court may also provide in the same case for its retrospectivity *Witherspoon v. Illinois*, 391 U.S. 510 (1968); or do so in a subsequent case *Gideon v. Wainwright*, 372 U.S. 335 (1963)—retrospective by *Doughty v. Maxwell*, 376 U.S. 202 (1964); or provide for prospective application only by a subsequent case, *Mapp v. Ohio*, 367 U.S. 643 (1961),—prospective for judgments after 6/19/61. *Linkletter v. Walker*, 381 U.S. 618 (1965).

In three cases where the new rule was applied retrospectively, *Griffin v. Illinois*, 351 U.S. 12 (1956); *Gideon v. Wainwright*, 372 U.S. 335 (1963); and *Jackson v. Denno*, 378 U.S. 368 (1964), "the principle . . . applied went to the fairness of the trial—the very integrity of the fact-finding process." *Linkletter v. Walker*, supra, (381 U.S. at 639).

Other considerations are "the necessity for an effective deterrent to illegal police action," and on the other hand "the wholesale release of the guilty victims." *Linkletter v. Walker*, (381 U.S. at 636-37). The reliance on the

old rule in criminal cases is not by the litigant, the defendant. The reliance is on on the part of the law enforcement officers. *Johnson v. New Jersey*, 384 U.S. 719, 731 (1966).

These considerations are not present in a civil case. The problem in the civil case is different, and the last paragraph of *Simpson* and the five way test from *Hanover v. United Shoe Co.*, supra, point the way.

The major consideration is—did a party to the present litigation rely on a rule of law which has now been changed, so that it would be inequitable to apply the new rule to such party. There is another consideration which could conceivably come within the meaning of "any equities" referred to in *Simpson*. We note it briefly.

A substantial number of cases in which a plaintiff seeking damages has succeeded in persuading an appellate court to establish a new rule favorable to him, have applied the rule to him, but only prospectively as to all other possible plaintiffs. The reasons seem to be two: (1) that it is unfair to the party who has fought the case, sometimes through several courts, to tell him that he is right, but that he is to receive nothing for his efforts or his expenses, which may have been quite heavy, and (2) that there will be no incentive to a plaintiff to seek to have a new rule established, that is, to improve the law, if he is to get nothing for his pains if he succeeds.

Some, but not all of the cases seem to make a distinction between an individual plaintiff or small business entity, who for want of a better name we shall call the "one-time litigant" and the party which is a public body, a public utility, an insurance company or a major busi-

ness corporation, to whom we shall apply the term "an institutional litigant."

The first reason above operates in favor of the "one-time litigant" who undertakes to have a new rule established when he sues an "institutional litigant" that has a continuing and recurring interest in the problem, such as an insurance company defending damage claims, a public utility defending similar claims, a manufacturer defending products liability cases, or a major company defending an antitrust case. By and large, the injured plaintiff in such cases is an individual or small business entity, who or which may have such a case only once in a lifetime. He gets no reward out of establishing a new rule in favor of others; if his damages are not recovered in the suit he brings, he will never get any. On the other hand, the "institutional litigant" that secures the establishment of a new rule, has the prospect of continuing future benefits from the rule, even if he does not get the benefit of the rule in the particular case. This may well be sufficient inducement for it to seek a new rule.

We cite in the margin[1] the cases in which an "institutional litigant" having a continuing interest in the problem secured a new rule, favorable to it, in a particular

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[1] *State ex rel. Wash. State Finance Committee v. Martin*, 62 Wash. 2d 645, 663-73; 384 P.2d 833 (1963) (the state v. the state treasurer); *Southern Pacific Co. v. Cochise County*, 92 Ariz. 395, 377 P. 2d 770 (1963) (a tax case); *Mutual Life Ins. Co. of Bryant*, 296 Ky. 815, 824, 177 S.W. 2d 588 (1943); *American-First Title & Trust Company v. Ewing*, 403 P.2d 488 (Okla., 1965). As to such cases, see Levy, Realist Jurisprudence and Prospective Overruling, 109 U.Pa.L.Rev. 1, 17, 19 (1960). But the Arizona court in two other tax cases, has applied the new rule to the parties to the case, although declaring the rule to be prospective in other cases. *Duhame v. State Tax Comm'n*, 65 Ariz. 268, 179 P. 2d 392 (1947); *Arizona State Tax Comm'n v. Ensign*, 75 Ariz. 376, 257 P. 2d 252 (1953).

case, but did not get the benefit of the rule in that case. Nevertheless, it stood to benefit by the rule in future cases.

When we turn to the "one-time litigant" who gets a new rule established, a number of the cases give him the benefit of his success in the case in which the new rule is established.[5] Other cases deny the "one-time litigant" the benefits of his victory.[6]

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[5] *Arizona State Tax Comm'n v. Ensign*, 75 Ariz. 376, 257 P. 2d 252 (1953) [tax]; *Duhame v. State Tax Comm'n*, 65 Ariz. 268, 257 P.2d 392 (1953) [tax]; *City of Fairbanks v. Schaible*, 375 P.2d 201 (Alaska 1962) [sovereign immunity]; *Darling v. Charleston Community Memorial Hospital*, 33 Ill.2d 326, 211 N.E. 2d 253 (1965), cert. denied 383 U.S. 946 (1966) [charitable immunity]; *Molitor v. Kaneland Community Unit. Dist.*, 18 Ill.2d 11, 163 N.E. 2d 89 (1959); *Parker v. Port Huron Hospital*, 361 Mich. 1, 105 N.W. 2d 1 (1960) [charitable immunity]; *Sherbutte v. Marine City*, 374 Mich. 48, 130 N.W. 2d 920 (1964) [sovereign immunity of a municipal corporation]; *Barker v. St. Louis County*, 340 Mo. 986, 104 S.W. 2d 371 (1937) [overruling prior cases which had upheld a 20-day statute of limitations for claims as to property taken for public use]; *Rampone v. Wauskuck Bldgs. Inc.*, 27 A.2d 586, 589 (R.I. 1967) [overruling prior rule that tenant could not sue landlord in tort for breach of covenant to repair. New rule applied to plaintiff, but otherwise only prospective as of 60 days after filing of opinion, "so as to afford all interested parties a reasonable opportunity to become aware of this decision and to be guided accordingly"]; *Widell v. Holy Trinity Catholic Church*, 19 Wis. 2d 648, 121 N.W.2d 249 (1963) [charitable immunity]; *Holytz v. Milwaukee*, 17 Wis. 2d 26, 115 N.W. 2d 618 (1962) [sovereign immunity]; *Kojis v. Doctors Hospital*, 12 Wis. 2d 367, 107 N.W. 2d 292 (1961); *Goller v. White*, 20 Wis. 2d 402, 122 N.W. 2d 193 (1963) [intrafamily immunity].

See also *Culpepper v. Culpepper*, 147 Fla. 632, 3 S.2d 330 (1941) where the court refused to apply to a pending case a rule *which had been applied* in the overruling case itself. Accord, *Florida Forest and Park Service v. Strickland*, 154 Fla. 472, 18 S.2d 251 (1944); *Ellsworth v. Brown*, 387 P.2d 634 (Okla. 1963).

[6] *Continental Supply Co. v. Abell*, 95 Mont. 148, 24 P.2d 133 (1933), where the court was badly split on the issue; *Hare v. General Contract Purchase Co.*, 220 Ark. 601, 249 S.W. 2d 973 (1952); *Spanel v. Mounds View School District*, 264 Minn. 279, 118 N.W. 2d 795 (1962); *Williams v. City of Detroit*, 364 Mich. 231, 111 N.W. 2d

The second reason, i.e. the "incentive idea," would seem to be applicable to private antitrust plaintiffs. The Supreme Court, this court, and many other courts, have repeatedly emphasized that the private remedy was established by the Congress as a matter of public policy, to enlist persons injured by antitrust violations as enforcers by providing an inducement, treble damages plus expenses.[7]

The trial court did not consider this possible aspect of the equities. There was good reason for its not doing so. First, the usual result in an action for damages is that if the plaintiff wins he gets a judgment for his damages. It is against this background that we must read the Supreme Court's comment, which refers to "equities that would warrant only prospective application . . . of the rule . . . we announce today." 377 U.S. at 24-25. We think that this means primarily that the appellant should recover unless there were equities favoring appellee that "would warrant" a denial of recovery to appellant, although it does not exclude the possibility of considering

1 (1961), where again the court was badly split. But see *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964), a case in which the court declined to apply the new rule *against* the plaintiffs in that case.

[7] *Perma Life Mufflers v. International Parts Corp.*, 392 U.S. 134, 139 (1968); *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 329 (1955); *United States v. Bordon Co.*, 347 U.S. 514, 518 (1954); *Mach-Tronics, Inc. v. Zirpoli*, 316 F.2d 820, 828 (9 Cir. 1963); *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 398 (9 Cir. 1957); *Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358 (9 Cir. 1955); *Byram Concretetanks Inc. v. Warren Concrete Products Co.*, 374 F.2d 649, 651 (3 Cir. 1967); *Mechanical Contractors Bid Depository v. Christiansen*, 352 F.2d 817, 821 (10 Cir. 1965); *Osborn v. Sinclair Ref. Co.*, 324 F.2d 368, 398 (4 Cir. 1963); *Kinnear-Weed Corp. v. Humble Oil & Ref. Co.*, 214 F.2d 891, 893 (5 Cir. 1954). Where is the incentive if, after winning, the plaintiff gets nothing? See Note, 71 Yale L.J. 907, 945 (1962).

equities favorable to appellant, once equities favoring appellee have been shown. Thus, the trial court properly directed its attention to equities favoring appellee.

Second, if there are equities that favor appellant, other than the fact that he won the appeal, they ought to be brought to the court's attention. But appellant did not claim before the trial court that there were such equities favoring him. He merely argued (a) that he should be entitled to recover because he won the appeal regardless of the equities favoring appellee, and (b) that there were no equities favoring appellee. The nearest appellant came to arguing the point was in an objection to the court's finding 14, where he said "that this finding conflicts with the Congressional purpose and proper judicial enforcement of the antitrust laws." There was no discussion, no assertion that there were special equities favoring appellant. In a memorandum in support of his motion for entry of judgment in his favor, under the heading "The law encourages appeals and operates retrospectively to remedy a wrong," appellant cited several cases, only two of which are ordinary civil cases. These were *Mosser v. Darrow*, 341 U.S. 267 (1951) and *Molitor v. Kaneland Community Unified School Dist.*, 18 Ill., 2d 11, 163 N.E. 2d 89 (1959). Again, there was no discussion, no claim that there were special equities favoring appellant. Reliance was solely on the bare fact that he was the successful appellant.

This was the fact that the trial court necessarily weighed against the equities that it found to be favorable to appellee. We do not ordinarily reverse on grounds not properly presented to the trial judge. *United States*

v. Hudspeth, 384 F.2d 683, 689 (9 Cir. 1967); *Stephens v. Arrow Lumber Co.*, 354 F.2d 732, 734 (9 Cir. 1966).

The problem is fraught with difficulties, and we only hold that the trial court proceeded in a proper manner to consider the "equities" which should save Union from liability to appellant.

(4) *A New Rule was announced by the Supreme Court in the Simpson case.*

We find it is clear that the Supreme Court announced a new rule in *Simpson*. The court's language concerning ". . . the rule governing price fixing by the 'consignment' device which we announce today," leaves no doubt. We do not intend to labor the point, except to cite the authorities relied on by the parties.

Union cites the line of supporting cases prior and subsequent to *United States v. General Electric Co.*, 272 U.S. 476 (1926).[8] In that case it was definitely settled that consignment was not illegal under the antitrust laws, as

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[8]The cases, in addition to *General Electric*, are *Standard Oil of Cal. v. United States*, 337 U.S. 293, 296, 298, 310 (1949); *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 411 (1911) Holmes, J. dissenting; *Boston Medical Supply Co. v. Lea & Febiger*, 195 F.2d 853, 856 (1 Cir. 1952); *Texas Co. v. Higgins*, 118 F.2d 636 (2 Cir. 1941); *United States v. General Electric Co.*, 115 F.Supp. 835 (D.N.J. 1953); *United States v. Richfield Oil Corp.*, 99 F.Supp. 280, 289 (S.D.Cal. 1951); affirmed per curiam 343 U.S. 922 (1952); *United States v. General Electric Co.*, 82 F.Supp. 753 (D.N.J. 1949); *United States v. Standard Oil Co. of Cal.*, CCH Trade Cas. Par. 69, 399 (1959); *United States v. Standard Oil Co. of Cal.*, CCH Trade Cas. Par. 69, 212 (1958); *Shasta Douglas Oil Co. v. Work*, 212 Cal.App.2d 618, 28 Cal. Rptr. 190 (1963); *Gonzalez v. Deerington*, 10 Cal. Rptr. 717 (1961), modified on other grounds 56 Cal.2d 130, 363, P. 2d 1, 14 Cal.Rptr. 1 (1961); *Westinghouse Electric Corp. v. Lyons*, 125 N.Y.S.2d 420 (Sup.Ct. N.Y. County

a price fixing arrangement; that there was a distinction between an agency and a sale; and that the antitrust laws did not prohibit one from determining the price at which he sells his own property.

Thus, under the five-way test in *Hanover* there was a clearly defined judicial doctrine, under which Union's conduct was lawful, a doctrine which was overruled, in favor of a new rule according to which conduct performed in reliance upon the old rule would have been unlawful. There remains only the question of Union's reliance on the old rule, a subject we discuss in the next section.

1953), affirmed 1 App.Div. 2d 770, 149 N.Y.S. 2d 212 (Sup.Ct. App.Div. 1956); *Avon Prod. v. Berson*, 206 Misc. 900, 135 N.Y.S. 2d 867, 874 (Sup.Ct.N.Y. County 1954).

Union also cites cases and comments concerning the General Electric Rule, all stating that *Simpson* was a new rule in antitrust law; *Sun Oil Co. v. F.T.C.*, 350 F.2d 624, 635 (7 Cir. 1965), cert. denied 382 U.S. 982 (1966); *C.B.S. Business Equip. Corp. v. Underwood Corp.*, 240 F.Supp. 413, 424 (S.D.N.Y. 1964); *Lyons v. Westinghouse Elec. Corp.*, 235 F.Supp. 526, 535-7 (S.D. N.Y. 1964); Brodley, *Oligopoly Power Under the Sherman and Clayton Acts—From Economic Theory to Legal Policy*, 19 Stan. L.Rev. 285, 320 (1967); Day, *Developments in Antitrust During the Past Year*, 25 A.B.A. Antitrust Section 3, 32 (1964); Handler, *Recent Antitrust Developments—1964*, 63 Mich. L.Rev. 59, 60, 62-64 (1964); Rahl, *The Demise of Vertical Price Fixing Through Consignment Arrangements: The Simpson Case*, 29 A.B.A. Antitrust Section 216 (1965); Rahl, *Control of an Agent's Prices: The Simpson Case—A Study in Antitrust Analysis*, 61 Nw.U.L.Rev. 1 (1966); 2 Tulsa L.J. 55 (1965); Note, *Antitrust —Consignment Agreements To Fix Retail Prices*, 18 Vand. L.Rev. 222, 228 (1964); 10 Vill. L.Rev. 366, 368-369 (1965).

Appellant relies on: *F.T.C. v. Texaco, Inc.*, 381 U.S. 739 (1965); *Atlantic Ref. Co. v. F.T.C.*, 381 U.S. 357 (1965); *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960); *Standard Oil Co. of Cal. v. United States*, 337 U.S. 293 (1949); *United States v. Masonite Corp.*, 316 U.S. 265 (1942); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *F.T.C. v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922); *United States v. Richfield Oil Corp.*, 99 F. Supp. 280 (S.D. Cal. 1951), affirmed per curiam, 343 U.S. 922 (1952); *Stanton v. Texaco, Inc.*, 289 F.Supp. 884, 888-89 (D.R.I. 1968).

(5) *Reliance by Union and the Equities*

Had the trial court allowed the verdict to stand and entered judgment theron, it would have been for $160,000 trebled, i.e. $480,000 plus attorney's fees.

Union had owned the leasehold on a service station in 1956. Relying on *United States v. General Electric*, 272 U.S. 476 (1926) it marketed its gas by consignment. Appellant, a former employee, helped put the consignment plan into effect. At his request he was given a lease for 1 year on Union's station which was later renewed for one year. For refusing to comply with his consignment agreement, the lease was not renewed.

Although some cases hold that reliance on existing law is presumed, *State v. O'Neil*, 147 Iowa 513, 126 N.W. 454, 457, (Sup. Ct. of Iowa 1910), *Continental Supply Co. v. Abell*, 95 Montana 148, 24 P.2d 133, 140[3] (Sup. Ct. of Mont. 1933), Union offered proof of its reliance and the trial court made findings of fact and conclusions of law. They show that: Union's General Counsel was consulted about the consignment device and he advised Union that there were "no legal objections" and the device was "lawful both under the antitrust laws and all other laws." General Counsel studied, among others, the *General Electric* case and was "entirely satisfied" that "consignment and the proposed method of merchandising were lawful in every respect and would not violate the antitrust law;" that the consignment agreement was "modeled upon" and was "substantially the same" as the agreement and arrangement in *General Electric*, and was true and bona fide; that acting in reliance on its General Counsel's opinion, Union put the plan in operation; that in 1954

and at all times until the *Simpson* decision on April 20, 1964 it was the "general and uniform view" that *General Electric* was the law and "that the rule of the case applied to all kinds of merchandise, and was not confined to patented articles;" that Union "acted reasonably and justifiably;" that until the *Simpson* decision Union "reasonably believed" that consignment agreements were wholly lawful and did not violate the antitrust laws and that Union was fully justified in that belief.

These findings were fully supported by the evidence and are binding on us. Appellant makes two attacks, one that the General Counsel did not give consideration to certain decisions. We have cited appellant's cases heretofore for reference and have held that the Supreme Court in *Simpson* knew it was announcing a new rule and so stated.

The second attack on the findings is that the General Counsel left enforcement of the agreements to a "marketing" department. If the consignment agreements were then legal it would follow that Union would have a right to enforce them. One method of enforcement was refusal to deal with a consignee who breached his agreement. Thus Union refused to renew appellant's lease.

The court made a finding that this was the only "coercion"[9] used against appellant. It was supported by the evidence and by a stipulation entered between counsel at the trial. No agreement provided appellant must take any

[9]See comments concerning the term "coercion" used in the Simpson opinion. *Handler*, supra note 8, at 64-5; *Rahl*, supra note 8, 29 A.B.A. Antitrust Section at 221-22; *Rahl*, supra note 8, 61 Nw. U. L.Rev. at 3, 8-9; 17 Stan. L.Rev. 519, 521-23 (1965); 2 Tulsa L.J. 55, 56-7 (1965); 37 U.Colo.L.Rev. 293, 294 (1965).

or all of his gasoline needs from Union. See *Simpson v. Union Oil Co.*, 311 F.2d 764, 766.

We think the court's finding on coercion was supported by the record, and that since the consignment agreement was lawful under *General Electric* it was also lawful to enforce it by refusal to deal and refusal to renew the one year lease.

The findings of the trial court on the equities and reliance were fully supported by the record.

II.

THE ORDER GRANTING A NEW TRIAL

The trial court refused to enter a judgment on the verdict but instead dismissed the case with prejudice, because of Union's reliance on prior laws and because the "equities" warranted only prospective application of the new rule in *Simpson* and did not warrant application to the case at bar.

The trial court also granted Union's motion for a new trial "should a further trial be necessary."

The grant or denial of a new trial rests within the sound discretion of the trial court and absent a showing of clear abuse of discretion will not be overturned on appeal. *Oswald v. Cruz*, 289 F.2d 488 (9 Cir. 1961); *Moist Cold Refrigerator Co. v. Lou Johnson Co.*, 249 F.2d 246, 256 (9 Cir. 1957), cert. denied 356 U.S. 968, where the court said:

> "But having permitted the jury to come to its conclusion on the facts, *the trial judge then had the right, and indeed the duty, to weigh the evidence, as he saw it, and to set aside the verdict of the jury,*

> *even though supported by substantial evidence*, where, in his conscientious opinion, the verdict is contrary to the weight of the evidence or based upon evidence which is false, or to prevent, in the sound discretion of the trial judge, a miscarriage of justice." (Emphasis added).

Appellant's contention that the verdict was "well within the range of lost values to Mr. Simpson for the destruction of his business" does not rest on correct principles of law. Appellant also confuses the rule for granting a judgment N.O.V. with the rules for granting a new trial. A judgment N.O.V. is improperly granted if there is sufficient evidence to support the verdict. *Williams v. Nichols*, 266 F.2d 389, 393 (4 Cir. 1959) where the case was remanded for "an analysis and appraisal by the trial court of the weight of the evidence."

See *Moore's Federal Practice*, Sec. 5908(5) and particularly page 3817, where motions for a directed verdict or for judgment N.O.V. both raising the legal sufficiency of the evidence are "sharply distinguished" from a motion for a new trial which is "addressed to the sound discretion of the trial court." *Liquid Veneer Corp. v. Smuckler*, 90 F.2d 196 (9 Cir. 1937) and *Peterman v. Indian Motorcycle Co.*, 216 F.2d 289, 292 (1 Cir. 1954) were cases where a motion for a new trial was denied. If they stand for the proposition appellant contends for,—that a verdict should not be set aside on a motion for new trial if "it can be sustained from any viewpoint of approach" (*Liquid Veneer*, page 205) they do not represent the present law of this circuit. *Moist Cold Refrigerator Co. v. Lou Johnson*, supra.

The power of a court of appeal to review the granting or denying of a new trial for excessive or inadequate verdicts or on the ground the verdict is against the weight of the evidence, is not as broad as that of the trial court in granting or denying the motion for a new trial in the first instance. *Southern Pacific Co. v. Guthrie*, 186 F.2d 926, 932-3 (9 Cir. 1951), cert. den. 341 U.S. 904; *Siebrand v. Gossnell*, 234 F.2d 81; 94 (9 Cir. 1956).

No detailed listing of the evidence supporting appellant's theory of damages is necessary. The trial court stated that after the verdict was returned he was "shocked" with it. He granted the new trial on the grounds "that the verdict is against the weight of the evidence, shocks the conscience, is grossly and monstrously excessive, is the result either of passion or prejudice or of consideration by the jury of factors irrelevant to the litigation, is speculative, conjectural and a miscarriage of justice."

Appellant's theory of damage was that his business had been destroyed and he purported to offer proof on the value of his business as a service station operator. In *Standard Oil Company of California v. Moore*, 251 F.2d 188 (9 Cir. 1957), cert. denied 356 U.S. 975, this court had before it the question of valuing a retail gasoline business. It laid down the rule as follows:

> "It was Moore's contention that his business had been totally destroyed on August 15, 1952, when he could no longer obtain gasoline. He therefore asked the jury to measure his damages by the market value of the business on that date. Moore owned the land and the other capital assets of the business, and re-

tained them when he went out of business. It follows that the only value which his business had before it was closed that it did not have afterwards was its 'going concern' or 'good will' value.

"As one means of proving going concern or good will value, Moore produced the opinion testimony of an expert witness. The hypothetical question asked of this witness included, as one of its assumptions, that in August, 1952, Moore was forty-one years of age, was in reasonably good health, and wanted to continue the management of the service station. Appellants argue that the question, as so framed, was irrelevant to the issue.

"We agree. In measuring the value of the good will of such a business, appropriate factors to be considered are: (1) What profit has the business made over and above an amount fairly attributable to the return on the capital investment and to the labor of the owner? (2) What is the reasonable prospect that this additional profit will continue into the future, considering all circumstances existing and known as of the date of the valuation? See Kimball Laundry Co. v. United States, 338 U.S. 1, 16-17, 69 S.Ct. 1434, 93 L.Ed. 1765. These are the factors which would influence a prospective purchaser. The special value which the business might have to Moore, or the profit potential of the business beyond that which would be transferable to a purchaser, would have no effect on market value of the business.[4]"

[4] "Moore retains his life expectancy and business acumen. Assuming that he is entitled to, and so receives, the market value of the destroyed good will of his business, he can, at least theoretically, do as well with it as he could have done by continuing in business at his Fourth Avenue South location."

Appellant proceeded however as if his case was one involving personal injuries. He premised his proof on the theory that he could operate the station for his life expectancy, 24 years, and on a calculation of net profits for the period; and on the further assumption that, having lost the business, he would never have any other earnings for the rest of his life, just as if he had been personally permanently disabled.

Appellant's damage, if any, resulted from (1) lost profits, if any, during his operation of the station because of the illegal restraints imposed on him by Union, and (2) the refusal of Union to renew his second one year lease and such further renewals as might be reasonably anticipated.[18] There was evidence of Union's policy to continually renew leases. A buyer, in valuing appellant's business, could reasonably take into account Union's renewal policy. But any damage suffered was, in general terms, damage to a going business and not personal injury or damage which would thereafter deprive appellant of all earning power from his services. The proper measure of damage was the market value of the business, i.e. the value of the goodwill of an operating business, and not the loss of earning power by appellant for his life time.

There was evidence that appellant remained in possession after his lease expired in May 1958 until June 5, 1958. He then operated a Mobil station for 2 years. After

[18]There were also minor items of damage such as loss on sale of equipment, etc.

leaving the Mobil station he never again engaged in any branch of the oil or gasoline business, and the record shows he had no desire to.

The proof also showed from his profit and loss statement that his "take home" from the Union station averaged $473.43 per month and from the Mobil station $476.95 per month. He worked 17 hours per day, 7 days a week during his first year at the Union station and during the second year 12 hours per day 7 days a week. But the "take home" was not net profits from a business, since no allowance was made for the value of his labor.

"The earnings from the station were only material in so far as they had a bearing on the market value of the business. Except in this respect, appellant's earnings were totally irrelevant. The issues should have been, what was the value of the business, what money did appellant have invested in it, what was its net income *after* deducting a fair return on capital and fair compensation to appellant for his work, what were the prospects of continual renewals of the lease and finally, if illegal restraints were removed, what were the prospects of additional profit from the business as it became better established. These are the factors that a willing buyer would consider in determining fair market value of the business.

Appellant's expert accountant played with figures, computed sums of money appellant *might* have earned at the service station and multiplied it by 24 years, his life expectancy. The $160,000 represented the present discounted value of about $10,500 per year over the 24 year period.

Clearly this type of evidence and computations[9] does not comply with the method to value the loss of a business. No allowance was made for the value of appellant's labor, *Standard Oil Company v. Moore*, supra; and there was no diminution by reason of appellant's continued earning capacity.

Contention is made by appellant that affidavits taken from jurors and before the court caused or played a part in the trial judge's decision to grant the motion for a new trial. Without discussing the appropriateness of such affidavits in this case, it is sufficient to state that the trial court expressly stated, in ruling on the motions for new trial that he did not rely on the jurors' affidavits.

We agree with the trial court that a $160,000 verdict for refusal to renew a one year lease is "monstrous" and against the weight of the evidence. The trial court did not abuse its discretion in granting a new trial.[10]

The judgment is affirmed.

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[9] Union properly requested instructions based on *Standard Oil Co. of Cal. v. Moore*, 251 F.2d 188, 9 Cir. 1957, cert. denied 356 U.S. 975 (1958). They were rejected and exception taken. Union also requested an instruction that the jury should consider appellant's earning power in other occupations. It was also refused and exception taken. Thus the case went to jury much like a personal injury case in which the plaintiff was fully incapacitated and had lost his entire earning power.

Appendix B

United States Court of Appeals
for the Ninth Circuit

No. 22,148

Richard Simpson,
Petitioner,
vs.
Union Oil Company of California,
a corporation,
Respondent.

ORDER

Before: JERTBERG, CARTER and DUNIWAY,
Circuit Judges

The panel having voted to deny a rehearing and to reject the suggestion for a rehearing in banc; and the members of the court having been advised, pursuant to General Order No. 15(4) that the panel does not favor a rehearing in banc; and no judge having voted for a rehearing in banc,

It is ordered that the petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

Gilbert H. Jertberg
Ben C. Duniway
James M. Carter
Circuit Judges

Filed June 13, 1969.
Wm. B. Luck, Clerk.

Appendix C

Sherman Antitrust Act, Act of July 2, 1890, Chap. 647, 26 Stat. 209, as amended; 15 U.S. Code, Secs. 1, 2;

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided*, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the Act entitled 'An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,' approved September 26, 1914: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers,

or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. [July 2, 1890, Chap. 647, Sec. 1, 26 Stat. 209; August 17, 1937, Chap. 690, Title VIII, 50 Stat. 693; July 7, 1955, Chap. 281, 69 Stat. 282; 15 U.S. Code, Sec. 1.]

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. [July 2, 1890, Chap. 647, Sec. 2, 26 Stat. 209; July 7, 1955, Chap. 281, 69 Stat. 282; 15 U.S. Code, Sec. 2.]"

Sec. 4 of the Clayton Act, October 15, 1914, Chap. 323, §4, 38 Stat. 731, 15 U.S.C. §15, provides:

"Sec. 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Appendix D

Antitrust Division

United States Department of Justice
1602 U. S. Post Office and Court House
Los Angeles 12, California

60-57-35 February 12, 1960

Mr. Maxwell Keith
Attorney at Law
111 Sutter Street
San Francisco 4, California

Dear Mr. Keith:

Your letter of February 5, 1960, asks whether my letter of June 19, 1959, to Moses Lasky, Esq., of San Francisco, is to be construed as an expression of opinion or a statement of policy of the Antitrust Division of the Department of Justice; that Union Oil Company's consignment program is a lawful practice consistent with the antitrust laws. The answer is no.

My letter to Mr. Lasky was in response to a letter from him asking for an interpretation of Section XI of the final judgment in *United States v. Standard Oil Company of California, et al.*, Civil No. 11584-C. Mr. Lasky did not inquire whether the consignment practices of Union Oil Company were considered by the Department of Justice to violate the antitrust laws, and I expressed no opinion as to any such matter.

The final judgment to which my letter to Mr. Lasky refers (copy enclosed) recites that the Government sought to prohibit retail selling by defendant oil companies,

either through employees or agents or consignees; that the Court held a pretrial hearing as a result of which the Court ruled that even if it should be proved at trial that defendants had violated the law, the Court would not grant the relief sought by the Government concerning retail selling by defendant oil companies.

Section XVI B of the final judgment specifically provides that it should not act as a bar or estoppel to any suit, proceeding, or litigation which might be brought by the Government against any defendant for the acts of any defendant individually or in conjunction with a non-defendant, including acts or practices relating to retail marketing, and including acts or practices occurring before as well as after the entry of the final judgment. The purpose of this section was to make clear that the consent judgment should not be construed as determining the legality or illegality of consignment selling by any defendant, and to leave the Government free to institute action against such a marketing practice if it should decide that such action was warranted.

Sincerely yours,

Robert A. Bicks
Acting Assistant Attorney General
By Geo. B. Haddock
Chief, Los Angeles Office

Enclosure

Appendix E

February 5, 1960

Mr. George B. Haddock
Attorney at Law
Department of Justice
Anti Trust Division
1602 US Post Office and Court House
Los Angeles 12, California

Dear Mr. Haddock:

In connection with a case I am handling, Simpson v. Union Oil Company of California, which involves the legality of Union's consignment program, Mr. Moses Lasky, representing Union, has submitted to the Court the attached letter written by you. The letter is being used in connection with a motion for summary judgment by the defendant.

May I ask you if your letter to Mr. Lasky is to be construed as an expression of opinion or a statement of policy of the Department of Justice, Antitrust Division, that Union Oil Company's consignment program is a lawful practice consistent with the antitrust laws.

Very truly yours,

Maxwell Keith

MK:a
Enclosure

"Antitrust Division
1602 U.S. Post Office and Court House
Los Angeles 12, California

60-57-35 June 19, 1959

Moses Lasky, Esquire
Brobeck, Phleger & Harrison,
111 Sutter Street
San Francisco 4, California

Dear Mr. Lasky:

Reference is made to your letter of June 11 in which you ask for an expression of opinion from the Antitrust Division as to the effect of Section XI of the Final Judgment in *United States v. Standard Oil Company of California* et al., Civil No. 11584-C, upon the right of a defendant consignor to determine the prices at which its consigned products should be sold by a consignee.

I have been authorized to advise you, on behalf of the Antitrust Division, that the reference in Section XI to resellers embodies a definition of that term in subsection (m) of Section II and that Section XI therefore does not relate to consigned products or to consignees insofar as consigned products are concerned.

Sincerely yours,

Robert A. Bicks
Acting Assistant Attorney General
By Geo. B. Haddock
Attorney
Department of Justice"